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Voting--Not Quite a Fundamental Right? a Look at Legal and Legislative Challenges to Felon Disfranchisement Laws

Angela Behrens

Note

Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws

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Voting is a fundamental right in the United States, yet in the 2004 presidential election, over five million people were unable to cast a vote because of a felony conviction at some point in their lives.[1] Felon disfranchisement laws remove the right to vote based on a felony conviction. While disfranchisement laws vary by state, the laws collectively account for the largest group of American citizens unable to vote.[2] The existence of these laws therefore calls into question the notion of voting as a fundamental right.

The refusal of some states to extend the right to vote to persons convicted of a felony-level offense has prompted calls for reform. This Note explores both the legal and legislative challenges to state felon disfranchisement laws, questioning how the persistence of these laws squares with the notion of voting as a fundamental right. Part I first discusses briefly the progression of the right to vote toward near-universal status in the United States before giving an overview of felon disfranchisement and the debates sparked by these laws. Part I also presents some of the unsuccessful legal challenges to felon dis-

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1. Christopher Uggen et al., Estimated Disenfranchised Felon Population by State 2004 (2004) (unpublished statistics, on file with author); *see also* Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 797 (2002) (using the same methodology to estimate that 4.7 million people were disfranchised for the 2000 election).

2. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 308 (2000). Felon disfranchisement laws remove the right to vote in local, state, and federal elections.

franchisement and the successful legislative reforms in recent years. Part II juxtaposes felon disfranchisement laws with traditional voting rights cases, arguing that the former category should receive the same standard of review as the latter, and that courts should protect the voting rights of persons convicted of a felony at the same fundamental level as other citizens. Part II notes the weaknesses in justifications for these laws and illustrates how, if applied, felon disfranchisement laws cannot withstand a strict scrutiny standard of review. Finally, Part III argues that although some state legislatures have recently narrowed the scope of their felon disfranchisement laws, courts remain the appropriate forum for change.

I. ENFRANCHISING AND DISFRANCHISING IN THE UNITED STATES

A. THE PROGRESSIVE PROTECTION OF THE RIGHT TO VOTE

The right to vote in the United States is among the fundamental rights adult citizens possess in contemporary society.[3] While the country has a long history of exclusionary practices with regard to suffrage,[4] in the past two centuries the right to vote has been extended to more groups and has gained increasing protection, such that most consider voting a fundamental right.[5]

The United States Constitution originally left the determination of voting rights entirely to state power. Many states imposed restrictions on this right, often requiring taxpaying or property ownership as a prerequisite to vote, in addition to us-

3. *See infra* notes 22–24 and accompanying text.

4. *See generally* KEYSSAR, *supra* note 2 (discussing the history of voting rights in the United States); KENT REDDING, MAKING RACE, MAKING POWER: NORTH CAROLINA'S ROAD TO DISFRANCHISEMENT (2003) (discussing how the elite class of North Carolina used their power to disfranchise minorities over time); CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760–1860 (1960) (discussing voting rights in the United States in the eighteenth and nineteenth centuries).

5. *See infra* notes 15–24. Although this Note discusses voting as a right, some view voting as a privilege and that there are legally-recognized limitations on the right to vote. *See, e.g.*, J.S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 231 (R.B. McCallum ed., Basil Blackwell 1946) (1869) (calling suffrage a "trust," rather than a right); Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 172 (2001) (noting that "[v]oting is a right, but it is also a privilege"). See *infra* note 24 for some examples of legal limitations on the right to vote.

ing sex- and religion-based restrictions.[6] States also used race-based distinctions to limit the franchise to whites.[7] Throughout the nineteenth and early-twentieth centuries, however, several developments at the federal level curbed states' ability to limit voting to selected groups. Following the Civil War, the Fourteenth[8] and Fifteenth[9] Amendments extended the right to vote to all males and eliminated legal permission to disfranchise based explicitly on race.

Although the Constitution barred race-based disfranchisement by 1870, the implementation of disfranchising measures throughout the late-nineteenth and twentieth centuries is well-documented. States strategically circumvented legal barriers to undermine the spirit of the new amendments and to prevent racial minorities, particularly African Americans, from voting.[10] In response, Congress passed the Voting Rights Act[11] in 1965 to enforce the Fifteenth Amendment and eliminate racial discrimination in voting.[12] Congress amended and reauthorized the Act in 1970 and 1982,[13] and the Act now requires a results-

6. *See generally* KEYSSAR, *supra* note 2 (discussing state suffrage qualifications in early and contemporary America); WILLIAMSON, *supra* note 4 (discussing state suffrage qualifications in early American history).

7. *See generally* KEYSSAR, *supra* note 2 (discussing race restrictions and the limitation of voting rights to whites throughout American history); WILLIAMSON, *supra* note 4 (discussing the same).

8. U.S. CONST. amend. XIV.

9. *Id.* amend. XV.

10. *See* KEYSSAR, *supra* note 2, at 105–16 (detailing efforts to disfranchise racial minorities); *see generally* J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION (1999) (discussing voting rights during the Reconstruction Era); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910 (1974) (recounting the development of Southern politics post-Reconstruction).

11. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (2000)).

12. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) ("The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."). A 1959 report indicated that in the South, only about twenty-five percent of the eligible African American voting-age population was registered to vote, compared to nearly sixty percent of the eligible white voting-age population. U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 40–41 (1959).

13. Despite passage of the Voting Rights Act in 1965, it soon became clear that the Act was not effective in eliminating racial discrimination with regard to the right to vote. A 1975 report by the U.S. Commission on Civil Rights detailed a range of tactics used by election officials to deny voting rights to racial minorities. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN

based test applying the "totality of circumstances" to all claims of racial discrimination arising under the statute.[14]

Thus, by the mid-1960s, states had lost significant power to define voter qualifications, and could no longer disfranchise based on race,[15] sex,[16] or wealth,[17] and, nationally, the voting age had been lowered.[18] A series of Supreme Court decisions confirmed this new protection of the franchise as it struck down other restrictions on suffrage, such as poll taxes,[19] residency requirements,[20] and literacy tests.[21] In *Reynolds v. Sims*,[22] the

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YEARS AFTER 98–104 (1975). Similarly, a 1981 report detailed the negative impact of restrictive registration practices on minorities. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 28–31 (1981); *see also* STEPHEN L. WASBY, JOINT CTR. FOR POLITICAL STUDIES, VOTE DILUTION, MINORITY VOTING RIGHTS, AND THE COURTS 1 (1982) (noting that since initial passage of the Voting Rights Act in 1965, "the bolder forms of voting discrimination have largely given way to more subtle means").

14. The Voting Rights Act is codified at 42 U.S.C. § 1973, and presently reads, in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . . (b) A violation of subsection (a) of this section is established if, *based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973 (2000) (emphasis added).

For application of subdivision (b) of the Act under the 1982 amendment, commonly referred to as section 2, see, for example, *Chisom v. Roemer*, 501 U.S. 380, 394 (1991) and *Thornburg v. Gingles*, 478 U.S. 30, 83 (1986) (O'Connor, J., concurring). Prior to the 1982 amendment, a showing of discriminatory intent was required to prove a violation of the Voting Rights Act. *See* City of Mobile v. Bolden, 446 U.S. 55, 65 (1980). Under the results-based standard, the Court has noted that "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg*, 478 U.S. at 42.

15. U.S. CONST. amend. XV; *see also* 42 U.S.C. § 1973.

16. U.S. CONST. amend. XIX.

17. *Id.* amend. XXIV.

18. *Id.* amend. XXVI (lowering the minimum voting age to eighteen years of age).

19. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).

20. Dunn v. Blumstein, 405 U.S. 330, 360 (1972).

21. Katzenbach v. Morgan, 384 U.S. 641, 658 (1966) (upholding section 4(e) of the Voting Rights Act, which prohibited the enforcement of a New York

Court stressed the significance of the right to vote in a democracy:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[23]

As a fundamental right, restrictions on the right to vote are therefore subject to a strict scrutiny standard of review; states may limit the right only to serve a compelling state interest through narrowly-tailored means.[24]

B. THE DEVELOPMENT OF FELON DISFRANCHISEMENT LAWS IN THE UNITED STATES

Although the right to vote gained increasing constitutional protection in the past two centuries, felon disfranchisement laws have retained a strong presence in the United States. Forty-eight states now disfranchise those convicted of a felony for some length of time.[25] In contrast to the general expansion of voting rights, felon disfranchisement laws developed in such a manner as to restrict the size of the electorate.

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statutory requirement of English literacy for enfranchisement).

22. 377 U.S. 533 (1964).

23. *Id.* at 561–62. The Court made similar proclamations in *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969), noting that "the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials" and in *Harper*, 383 U.S. at 668, condemning classifications that are "not germane to one's ability to participate intelligently in the electoral process."

24. The Court has upheld some restrictions on the right to vote. For example, the right does not extend to non-state citizens. Pope v. Williams, 193 U.S. 621, 633 (1904). The Court has also upheld some residency requirements. *See, e.g.*, Marston v. Lewis, 410 U.S. 679, 681 (1973) (upholding a fifty-day durational residency requirement as a condition to register and to vote). *But cf. Dunn*, 405 U.S. at 353 (striking down a one-year durational residency requirement). The Court has also allowed restrictions on the franchise in some special purpose elections. *See* Sayler Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 731 (1973) (upholding a California statute limiting the right to vote in water storage district elections to landowners); *cf. Kramer*, 395 U.S. at 633 (holding that New York did not have a sufficiently compelling state interest in limiting school district elections to property owners and parents).

25. Maine and Vermont are the only states that do not disfranchise felons for any length of time. *See, e.g.*, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (August 2004), *available at* http://www.sentencingproject.org/pdfs/1046.pdf.

1. Early Disfranchisement Laws in the United States

The concept of imposing disfranchisement as a consequence to a criminal act dates back to colonial times in the United States[26] and stems from European models.[27] In addition to punishment, disfranchisement was among the many civil disabilities imposed for violating a social norm.[28] Disfranchisement was thought to serve both as a form of retribution and as a deterrent from crime.[29] Disfranchisement and other collateral consequences included a very public component, serving as both general and specific deterrents "because the stigma of the loss of civil rights in the small communities of those times increased the humiliation and isolation suffered by the offender and his family and served as a warning to the rest of the community, all of whom probably knew the offender."[30] Losing the right to vote, however, was limited to few crimes and imposed only by judicial mandate.[31]

In the United States, disfranchisement was among the retained European legal vestiges. Colonial laws in the 1600s and 1700s often disfranchised for "moral" violations, such as drunkenness and fornication.[32] Some acts, such as bribing an elected official, resulted in permanent disfranchisement, while other acts imposed temporary periods of disfranchisement.[33] As the country took shape at the end of the eighteenth century and throughout the nineteenth century, many states incorporated criminal disfranchisement provisions into their constitutions at statehood.[34] The provisions, however, were typically either lim-

26. *See* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–63 (drawing upon colonial examples of seventeenth and eighteenth century laws that imposed disfranchisement based on "moral qualifications").

27. *See* Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 721–24 (1973) (discussing European responses to crime through civil death, outlawry, infamy, and attainder); *see also* KEYSSAR, *supra* note 2, at 162–63.

28. *See* Itzkowitz & Oldak, *supra* note 27, at 726–27. Violations could be of either a legal or a moral norm. *Id.* at 726.

29. *Id.* at 726–27; *see also* Ewald, *supra* note 26, at 1059–63.

30. Itzkowitz & Oldak, *supra* note 27, at 726–27. These forms of punishment were alternative to other public forms of punishment, such as hanging and mutilation. *Id.* at 726.

31. Ewald, *supra* note 26, at 1061.

32. *Id.* at 1061–62.

33. *Id.* at 1062.

34. Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro*

ited in scope[35] or granted the state legislature the power to pass laws disfranchising based on crime.[36] Until the mid-nineteenth century few states had laws that broadly disfranchised for felony convictions.

2. Moving Toward Widespread Disfranchisement in the United States

By 1850, eleven of the thirty-two states disfranchised based on a felony conviction.[37] In 1870, however, twenty-eight of the then thirty-eight states had such laws.[38] The period following the Civil War was one of particular change.[39] Some states incorporated new disfranchisement laws into revised state constitutions, while legislatures in other states began using longstanding constitutional provisions that enabled them to pass disfranchisement laws.[40] Most new states entered the Union with a felon disfranchisement law.[41] Not only had the sheer number of disfranchising states increased, but the nature of the laws had changed as well. Rather than barring a small offense-specific group from voting, laws began to encompass all felonies, without attention to the underlying crime.[42] In addition, most of these laws provided for indefinite disfranchisement, typically requiring a gubernatorial pardon to restore the right.[43] In some cases, the right was never restored.[44]

Paired with the expansion and formalization of the crimi-

Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002, 109 AM. J. SOC. 559, 565–66 (2003).

35. Common crimes resulting in disfranchisement included perjury and bribery. Ewald, *supra* note 26, at 1064. Vermont, for example, disfranchised those convicted of an election crime (giving or receiving bribes) for the election related to the offense. VT. CONST. ch. II, § 55 (1793).

36. Behrens et al., *supra* note 34, at 564–66. Florida's 1838 constitution, for example, gave its General Assembly the "power to exclude . . . from the right of suffrage, all persons convicted of bribery, perjury, or other infamous crime." FLA. CONST. art. VI, § 2 (1838).

37. Behrens et al., *supra* note 34, at 564–66.

38. *Id.*

39. *See infra* notes 84–86 and accompanying text.

40. Behrens et al., *supra* note 34, at 564–66.

41. *Id.*

42. See *id.* at 563 for a discussion of the growth of broad-sweeping felon disfranchisement laws in the United States during the mid- to late-nineteenth century.

43. *See id.* at 564.

44. *Id.*

nal justice system in the nineteenth century[45] and the uniquely high incarceration rate the United States attained throughout the twentieth century,[46] felon disfranchisement laws now encompass a large population. Further, because states hold the power to define crimes and designate various levels of offenses,[47] the definition of "felony" has vastly expanded.[48] In addition to any internal impact on the disfranchised population,[49] the group has reached a critical size and holds the potential to change election outcomes.[50]

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45. *See generally* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993) (giving a comprehensive history of the development of the criminal justice system in the United States).

46. In 2002, the United States' incarceration rate was 701 inmates per 100,000 residents. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2002, at 2 (2003). This rate far exceeds those in other nations. *See, e.g.*, Marc Mauer, *Comparative International Rates of Incarceration*, at 2, *available at* http://www.november.org/stayinfo/breaking/Incarceration.pdf (comparing the incarceration rates of fourteen nations); *see also* MARC MAUER, RACE TO INCARCERATE (1999) (giving a comprehensive overview of incarceration in the United States and its connection to race and class) [hereinafter MAUER, RACE TO INCARCERATE]. Incarceration rates in the United States were much lower until the 1970s, when the rate began to grow steadily. *Id.* at 17, 83.

47. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 128 (1982) ("The States possess primary authority for defining and enforcing the criminal law.").

48. *See, e.g.*, George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of* Infamia, 46 UCLA L. REV. 1895, 1899 (1999) (noting that at common law, the defining characteristic of a felony was that the offense was subject to capital punishment, whereas the modern definition of felony "implies simply that the offense is subject to punishment by a year or more in prison").

49. *See, e.g.*, Christopher Uggen et al., *"Less than the Average Citizen": Stigma, Role Transition, and the Civic Reintegration of Convicted Felons, in* AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION 261, 275–79 (Shadd Maruna & Russ Immarigeon eds., 2004) (discussing the symbolic meaning of disfranchisement through interviews with disfranchised persons); *see also* Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box,"* 102 HARV. L. REV. 1300, 1301 (1989) (arguing that disfranchisement is "driven . . . by an atavistic and deep-rooted social need to define the boundaries of the community by stigmatizing some persons as outsiders"); Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 333, 368 (1993) (arguing that voting is an expressive act that may give a voter "a sense of belonging, transcendence, and dignity that comes from being a valued member of the society").

50. Uggen & Manza, *supra* note 1, at 787–90, 792. A counterfactual analysis, accounting for voter turnout rates and voter preferences illustrates how disfranchisement laws likely would have changed the outcome of the 2000 presidential election, as well as a number of U.S. Senate elections, which would have altered the overall partisan composition of the Senate in the 1990s. *Id.*

3. The Current State of Felon Disfranchisement Laws in the United States

To date, Maine and Vermont are the only states that allow people to vote even while incarcerated.[51] The remaining forty-eight states typically disfranchise according to one of four regimes: (1) disfranchisement while incarcerated;[52] (2) disfranchisement while incarcerated or on parole;[53] (3) disfranchisement while serving a sentence (while incarcerated, or on parole or probation);[54] or (4) disfranchisement beyond completion of sentence.[55] Some states in the latter category make further distinctions, but, for the most part disfranchise some people for a period that exceeds any amount of correctional supervision.[56]

The contemporary effect of disfranchisement laws is the creation of a class of over five million people in the United States who cannot vote because of a felony conviction, a class that constitutes over two percent of the total voting-age population.[57] While other countries disfranchise some people convicted

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51. *See supra* note 25 and accompanying text. Although the incarcerated population in Maine and Vermont may not be legally disfranchised, incarceration itself often poses practical limitations on voting. *See, e.g.*, STEVEN KALOGERAS, THE SENTENCING PROJECT, JAIL-BASED VOTER REGISTRATION CAMPAIGNS 3 (2003) (detailing the difficulty of registering to vote or obtaining an absentee ballot while incarcerated). Utah and Massachusetts most recently added provisions in 1998 and 2000, respectively, to disfranchise prison inmates. *See infra* note 129 and accompanying text.

52. The thirteen states in this group are Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, and Utah. *See, e.g.*, THE SENTENCING PROJECT, *supra* note 25.

53. The four states in this group are California, Colorado, Connecticut, and New York. *Id.*

54. The seventeen states in this group are Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas, West Virginia, and Wisconsin. *Id.*

55. The fourteen states in this group are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Maryland, Mississippi, Nebraska, Nevada, Tennessee, Virginia, Washington, and Wyoming. *Id.*

56. Many states make distinctions based on the type of offense or previous commission of a felony or require waiting periods before restoring voting rights. *See, e.g.*, DEL. CONST. art. V, § 2 (2004) (restoring rights five years after completion of sentence); ARIZ. REV. STAT. ANN. § 13-912 (West Supp. 2003) (disfranchising only recidivists beyond completion of sentence); MD. CODE ANN., ELECTION LAW § 3-102 (2003) (distinguishing between violent offenders and non-violent offenders, and recidivists and first-time offenders); NEV. REV. STAT. ANN. 213.157 (Michie 2003) (discussing similar distinctions).

57. Uggen et al., *supra* note 1. While this estimate uses legal provisions to determine the size of the disfranchised population, the population that is prac-

of crimes, the United States easily surpasses the international norm both in its rates and duration of disfranchisement.[58] Thus, as a democratic country that heralds citizen participation in government and has increasingly protected the right to vote, the United States has simultaneously produced a contradictory trend of increasing and widespread disfranchisement.

C. WHO SHOULD HAVE THE RIGHT TO VOTE? THE DEBATES SURROUNDING FELON DISFRANCHISEMENT

Until recently, felon disfranchisement laws have, for the most part, retained a silent presence, with the issue receiving scant attention.[59] Several themes recur in current debates over

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tically disfranchised (as opposed to legally) may be even larger, as election officials are often misinformed about their state law and deny the right to those who legally should be able to vote. *See, e.g.*, Wayne Hoffman, *Some Counties May Not Let Felons Vote*, IDAHO STATESMAN, Aug. 25, 2003, at 1 (reporting that nearly one-third of the state's county election offices erroneously assumed that anyone with a felony conviction was permanently disfranchised; in Idaho, rights are restored upon completion of sentence); Marie McCain, *Getting Out the Vote for Ex-Cons: Initiative Aims to Fix Misconception that Rights Never Restored*, PIONEER PRESS (St. Paul, Minn.), Aug. 9, 2004, at 1A (discussing how many people in Minnesota are unaware that they regain their voting rights upon completion of sentence). Prior to the 2000 presidential election, officials in Florida purged from voting registries, or blocked from registering, tens of thousands of people who had had their voting rights restored and were otherwise eligible to vote. Gregory Palast, *Florida's "Disappeared Voters": Disenfranchised by the GOP*, NATION, Feb. 5, 2001, at 20. Prior to the 2004 presidential election, only the threat of litigation finally convinced the state to stop using the so-called "purge list" fraught with error. *See, e.g.*, Mary Ellen Klas et al., *State Drops Felon-Voter List*, MIAMI HERALD, July 11, 2004, at 1A; *Thousands of Eligible Voters on Florida Purge List* (National Public Radio Broadcast, July 2, 2004). Although people in jail awaiting trial are legally able to vote, the fact of confinement often makes it difficult to vote. KALOGERAS, *supra* note 51, at 3.

58. See generally BRANDON ROTTINGHAUS, INT'L FOUND. FOR ELECTION SYS., INCARCERATION AND ENFRANCHISEMENT: INTERNATIONAL PRACTICES, IMPACT AND RECOMMENDATIONS FOR REFORM (2003) for an overview of international disfranchisement laws. Of countries that disfranchise, most do so only for narrowly-tailored crimes, in case-specific situations, and for a limited amount of time. *Id.*; *see generally* Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753 (2000) (describing stringent restrictions on German courts' ability to limit former offenders' voting rights); Christopher Manfredi, *Judicial Review and Criminal Disenfranchisement in the United States and Canada*, 60 REV. POL. 277 (1998) (comparing the trend in the United States to allow states to disfranchise former offenders with increasing Canadian leniency in restoring voting rights).

59. The Sentencing Project, a research and advocacy organization in Washington, D.C., Dēmos, a public policy organization in New York City, and Right to Vote, a national coalition of eight organizations, are among the or-

the laws. Opponents of disfranchisement argue that voting is a fundamental right of a democracy, that the laws are unfair and an international anomaly, and that the laws have a suspect history and create a disparate racial impact. Proponents of disfranchisement, in contrast, argue that a criminal conviction represents a violation of the social contract that merits disfranchisement, and that disfranchisement laws are race-neutral both on their face and in their application.

1. The Right to Vote as a Fundamental Aspect of Democracy

Regardless of its exercise, the right to vote holds meaning. Those with a felony conviction remain citizens of their country and state, but a conviction generally divorces the concomitant right to vote from their status as citizens. Voting provides a means of expression and gives citizens the ability to choose those who will govern them.[60] Without this right, the governed population has no opportunity to challenge laws to which they are subjected. The loss of voting rights, then, essentially shifts a citizen to a second-class status.[61] Disfranchisement of those who have completed their sentence, and to a lesser extent all non-incarcerated persons, has been targeted as a particularly egregious practice in this respect.[62]

In opposition to this view, supporters of disfranchisement argue that committing a crime violates the social contract, and

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ganizations now actively tracking the issue of felon disfranchisement. *See* http://www.sentencingproject.org/pubs_05.cfm (last visited Sept. 28, 2004); http://www.demos-usa.org/votingrights/ (last visited Sept. 28, 2004); http://www.righttovote.org (last visited Sept. 28, 2004); *see also* Miles Rapoport & Jason Tarricone, *Election Reform's Next Phase: A Broad Democracy Agenda and the Need for a Movement*, 9 GEO. J. ON POVERTY L. & POL'Y 379, 396 (2002). Rapoport and Tarricone comment, "Only a few years ago, ex-felons who wanted to regain their fundamental right to vote had few vocal advocates. Now . . . momentum for restoring voting rights to ex-felons is building in many states across the country." *Id.*

60. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 562 (1964) (stating that voting preserves all other rights).

61. *See, e.g.*, Fletcher, *supra* note 48, at 1907 (discussing how disfranchisement impedes reintegration); Itzkowitz & Oldak, *supra* note 27, at 753 (commenting on the "criminal taint" disfranchisement leaves on people who have fully completed a criminal sentence); Uggen et al., *supra* note 49, at 268–72 (quoting some disfranchised persons' sentiments about the collateral consequences of a conviction); *see also infra* note 67.

62. Rapoport & Tarricone, *supra* note 59, at 393–94 (noting that disfranchising people past completion of sentence "erodes our democracy" because the laws "oppose[ ] two core American values: the democratic right to vote and the ability of the individual to leave the past behind and start a new life").

disfranchisement is a logical and fair consequence to that violation. A social contract perspective posits that all citizens are parties to an implicit contract to abide by the law and those who breach that contract rescind their right to participate in the political sphere of society.[63] Under this theory, anyone who has committed a crime cannot be trusted to vote responsibly or to promote the interests of the state.[64] Further, it is argued, offenders chose their status; in choosing to act criminally, the choice was also made to forfeit the right to vote.[65] Letting this group vote is unfair, it then follows, because their votes would dilute the votes of "law-abiding citizens."[66] States impose multiple other collateral consequences for criminal convictions,[67]

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63. *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION § 11, at 7–8 (J. W. Gough ed., Basil Blackwell 1947) (1690); JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 35 (Donald A. Cress ed. & trans., Hackett Publishing Co. 1983) (1762) (noting that when a person "has broken the social treaty . . . he is no longer a member of the state").

64. Clegg, *supra* note 5, at 172 (commenting that "[i]t is not too much to demand that those who would make the laws for others—who would participate in self-government—be willing to follow those laws themselves"). Clegg asserts that voters must be trustworthy and loyal and that enfranchisement is "hardly in the interests of a neighborhood's law-abiding citizens." *Id.* at 174, 177.

65. *See id.* at 177; *see also* Jeb Bush, *Comment*, SARASOTA HERALD TRIB. NEWSCOAST, Jan. 11, 2001 (on file with author). In defense of his state's stringent restoration process, the Florida Governor has commented that "[a]ny person, black or white, who could not legally vote in the last election due to his or her status as a felon could have retained the right to vote by simply not committing a felony in the first place." *Id.*

66. *See* Clegg, *supra* note 5, at 177; *see also* 148 CONG. REC. S797, S802 (daily ed. Feb. 14, 2002) (statement of Sen. McConnell) ("States have a significant interest in reserving the vote for those who have abided by the social contract.").

67. The collateral consequences following a felony conviction reach well beyond the loss of voting rights. Most states exclude those with a conviction from serving on a jury, running for public office, or owning a firearm. A felony conviction also creates limitations in finding housing or receiving welfare, and can serve as grounds for divorce or termination of parental rights. *See, e.g.*, Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67–70 (2003); Kathleen Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION, Sept. 1996, at 10 (1997); Andrea Steinacker, Note, *The Prisoner's Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 BYU L. REV. 801, 801–03 (2003); *see also* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 253 (2002) (likening the consequences of a conviction to an invisible "ton of bricks").

and supporters of disfranchisement frequently point to these restrictions as additional support for their position, particularly limitations on gun possession.[68]

Critics of disfranchisement charge that this view of the social contract is narrow and outdated,[69] and that a new contract forms upon placement back in the community, one that should not include disfranchisement.[70] Another critique stresses the lack of any nexus between the disfranchising crime and the propensity to vote "irresponsibly."[71] Roger Clegg, general counsel at the Center for Equal Opportunity and a supporter of disfranchisement, has commented that "[i]f these laws did not exist there would be a real danger of creating an anti-law enforcement voting bloc in municipal elections."[72] One disfranchised prison inmate, however, aptly challenged that logic when participating in an interview:

> [Disfranchisement] seems so asinine to me . . . . [T]hey have the expectation that you're going to reintegrate back into society, become a functioning, contributing member of society. But yet you're not allowed to have a say-so. Where's the logic in that? And, *what is the fear that someone who has committed a felony would actually have a voice? I mean are they afraid we're all going to band together and vote for the*

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68. *See, e.g.*, Jim Sloan, *Debate Continues over Felons' Voting*, TAMPA TRIB., Dec. 17, 2000, at 14 (quoting Todd Gaziano, an attorney at the Heritage Foundation: "Felons can't possess firearms, either, and that's a clear constitutional right . . . . [T]hose folks who want felons to be able to vote are not clamoring to overturn . . . laws prohibiting felons from owning guns."); *see also* Lowell Ponte, *Jesse Jackson: A Real Con Man*, FRONTPAGE MAGAZINE.COM (July 18, 2003), *at* http://frontpagemag.com/Articles/ReadArticle.asp?ID=8979 (discussing the same).

69. Note, *supra* note 49, at 1305–07; *see generally* Ewald, *supra* note 26 (discussing how both traditional liberal and republican notions should lead to supporting enfranchisement).

70. Afi S. Johnson-Parris, Note, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109, 133 (2003) (using traditional contract concepts to argue that a second social contract forms when a person reenters the community, and that, because the disfranchised person has unequal bargaining power, this contract is invalid based on the doctrine of unconscionability).

71. *See* Note, *supra* note 49, at 1303 (calling the rationale of preventing voter fraud by disfranchising felons "overinclusive"); Mark E. Thompson, Comment, *Don't Do the Crime if You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167, 190–93 (2002) (commenting on the illogical nexus between the commission of a felony and the propensity to commit an election offense); *see also* LORI MINNITE & DAVID CALLAHAN, DĒMOS, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD (2003) (finding that no significant threat of voting fraud exists).

72. Clegg, *supra* note 5, at 177.

> *wrong guy? I mean it's ridiculous.* You know, we're going to have some organized crime guy running for office, and we're all going to get behind him? . . . It makes no sense to me.[73]

Finally, many find the idea that a single conviction may have lifelong repercussions particularly troublesome,[74] and also point to the stark contrast between the United States and other democratic countries on the issue of felon disfranchisement.[75]

2. The Racial Origins and Impact of Felon Disfranchisement

The most frequently recurring arguments against felon disfranchisement laws center on their connection to race. Although the laws are facially race-neutral, their history is tied to racial politics and they interact with other processes in the criminal justice system to create a disparate racial impact, particularly for the African American community.[76]

Numerous disparate impacts exist within the events that necessarily precede a felony conviction. Stereotypes about potential criminals[77] lead to racial profiling and disparate arrest

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73. Interview by Christopher Uggen with a male inmate in his late twenties, Minnesota prison (Apr. 11, 2001) (emphasis added) (on file with author); *see also* Marc Mauer, *Disenfranchisement of Felons: The Modern-Day Voting Rights Challenge*, C.R. J., Winter 2002, at 40. Using a hypothetical "pro-burglary" felon, Mauer highlights procedural flaws in the "voting-bloc" argument. In addition to finding a supportive candidate and garnering enough voters to elect that candidate, the candidate would then have to persuade legislators and the state governor to pass new "pro-burglary" laws. Mauer, *supra*, at 42. Mauer concludes, "[t]his hardly seems like a substantial threat to the safety of the community." *Id.*

74. Johnson-Parris, *supra* note 70, at 131 (commenting that "[t]he sanction of disfranchisement is essentially a forfeiture of a very important right for a single type of breach of the social contract"); Symposium, *Constitutional Lawyering in the 21st Century*, 9 J.L. & POL'Y 209, 283 (2001). Professor Melissa Saunders has commented that:

> Numerous felons are disenfranchised for life for having committed one minor felony offense early on in their adolescence. That strikes me as something that we should be very concerned about as a democracy. It is an area in which we are dramatically out of step with the rest of the world.

Id.

75. JAMIE FELLNER & MARC MAUER, THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 17–18 (1998), *available at* http://www.sentencingproject.org/pdfs/9080.pdf.

76. Of the nearly 4.7 million people disfranchised for the 2000 presidential election, over 1.8 million were African Americans, representing almost 7.5% of the African-American voting-age population. Uggen & Manza, *supra* note 1, at 798. In sixteen states, that percentage exceeded ten percent. *Id.*

77. *See generally* Ted Chiricos et al., *Racial Composition of Neighborhood*

rates,[78] and a disparity is also evident in conviction rates[79] and decisions to incarcerate.[80] All of these factors therefore create a pool of disfranchised persons that includes a disproportionate number of racial minorities. Because applying felon disfranchisement laws on top of the circumstances surrounding a felony conviction results in the dilution of racial minorities' voting power, the argument continues that courts should therefore invalidate these laws because they violate the Fourteenth and Fifteenth Amendments, as well as section 2 of the Voting Rights Act.[81]

Supporters of disfranchisement stress the race-neutral language of the laws, arguing that there is no causal connection between the laws and the racial impact and that "there are non-racial reasons for disfranchising criminals."[82] Moreover, the Supreme Court has repeatedly held that a disparate impact

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and Fear of Crime, 35 CRIMINOLOGY 107 (1997) (finding a relationship between the percentage of young African American males in a neighborhood and white residents' fear of crime); Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOC. 717 (2001) (discussing the same).

78. MAUER, RACE TO INCARCERATE, *supra* note 46, at 126–36.

79. *Id.*

80. *Id.*

81. *See, e.g.*, Fletcher, *supra* note 48, at 1901–02 (noting that disfranchisement runs contrary to the Fourteenth and Fifteenth Amendments and that "use of disenfranchisement violates that conception of democratic equality that we have developed since the Civil War"); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 738 (1998) (discussing the racially discriminatory roots of disfranchisement); Alice E. Harvey, Comment, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1178 (1994) (arguing that the totality of circumstances test under the Voting Rights Act holds the potential to defeat felon disfranchisement laws); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act*, 103 YALE L.J. 537, 553 (1993) (discussing the same).

82. Clegg, *supra* note 5, at 169; *see also* Jesse Katz, *For Many Ex-Cons, Ban on Voting Can Be for Life*, L.A. TIMES, Apr. 2, 2000, at A1 (quoting Alabama Representative Bob McKee (R-Montgomery): "I don't care if they're Hispanic, black, white or whatever—I just take a dim view of anyone who breaks the law."); Bush, *supra* note 65 (expressing similar sentiments). Clegg recently commented that:

> [W]hat the NAACP should be doing, rather than complaining about the fact that a disproportionate number of criminals are African-Americans, is that they ought to be figuring out what can we do to keep such a high proportion of African American kids, particularly African-American young men from getting involved in crime.

Whose Vote Counts? (American RadioWorks broadcast, Nov. 2003), *available at* http://americanradioworks.publicradio.org/features/voting/transcript.html.

by itself is not enough to establish an equal protection violation.[83] Again, this argument focuses on individual choice to commit crime, noting that the laws apply equally to all people convicted of a felony, regardless of race.

Given the well-documented history of majority groups seeking to deny the right to vote to particular minority groups in the United States, however, it is not implausible to suspect that felon disfranchisement laws may similarly find their roots in this history, thus supplying a causal connection to the current disparate impact. The connection between felon disfranchisement and race is strong. The first wave of changes in felon disfranchisement laws occurred soon after the Civil War, corresponding with the extension of voting rights to minority groups in the Constitution,[84] and much of the discourse of the era evidences the clear and conscious intent to disfranchise minorities in this manner.[85] Recent research indicates that the racial composition of state prisons was a strong predictor of states passing a new or more restrictive felon disfranchisement law between 1850 and 2002.[86] Thus, race is not an issue entirely separate from felon disfranchisement.

While the contemporary era may lack the same open and public acceptance of the racial motives and discourse of the

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83. Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.").

84. Behrens et al., *supra* note 34, at 563.

85. Ratliff v. Beale, 20 So. 865, 867–68 (Miss. 1896); *see, e.g.*, JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 9–12 (Brown Printing Co. 1901). The president of Alabama's 1901 convention began the convention by urging the delegates to "establish white supremacy" and subvert "the menace of negro domination" through "manipulation of the ballot." *Id.* The convention later broadened its disfranchisement law to encompass anyone who committed a crime of "moral turpitude." *Id.* at 1201–02. The proponent of the new law speculated, "the crime of wife-beating alone would disqualify sixty percent of the Negroes." Shapiro, *supra* note 81, at 541 (citing JIMMIE F. GROSS, ALABAMA POLITICS AND THE NEGRO, 1874–1901, at 244 (1969)); *see also id.* at 537 & n.2 (citing 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA 3076 (1906) (quoting a Virginia Delegate who proclaimed, "Discrimination! [T]hat, exactly, is what this Convention was elected for . . . with a view to the elimination of every negro voter.")).

86. *See generally* Behrens et al., *supra* note 34. Using an event-history analysis, this research tracked state changes to felon disfranchisement laws and found a consistent and significant positive effect of the proportion of nonwhite inmates in a state prison on passage of a more restrictive felon disfranchisement law, net of region, state punitiveness, economic competition, political power, and time. *Id.* at 583–91.

nineteenth and early twentieth centuries, a racial undertone remains in relation to felon disfranchisement laws. Although a disparate impact is traditionally insufficient to establish discrimination based on race, case law and statutory history again reinforce the importance of the right to vote. Between the passage of the Fifteenth Amendment and the 1982 amendment to the Voting Rights Act there was an important, albeit slow, movement to assure equal access to the ballot, such that the Voting Rights Act now incorporates a totality of the circumstances approach in which a disparate impact is a factor.[87] While a disparate impact may not be dispositive, it is not irrelevant.

D. CHALLENGING FELON DISFRANCHISEMENT IN COURTS AND LEGISLATURES

Questions about felon disfranchisement have gone beyond academic debate. Members of the disfranchised population have challenged the legality of their status on numerous grounds in courts and many groups have pushed for change by state legislatures. While a flurry of litigation and legislative change emerged in the 1960s and 1970s,[88] comparably little movement occurred in the 1980s and 1990s. In recent years, however, courts and legislatures have again been asked repeatedly to reexamine the question of felon disfranchisement.[89]

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87. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 397 (1991) (explaining that section 2 allows challenges to voting laws where "under the totality of the circumstances . . . members of the protected class have less opportunity to participate in the political process").

88. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (upholding the constitutionality of felon disfranchisement); Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978) (upholding Texas's felon disfranchisement law); Green v. Bd. of Elections, 380 F.2d 445, 452 (2d Cir. 1967) (upholding New York's law); Fincher v. Scott, 352 F. Supp. 117, 119 (M.D.N.C. 1972) (upholding North Carolina's law), *aff'd mem.*, 411 U.S. 961 (1973); Kronlund v. Honstein, 327 F. Supp. 71, 73 (N.D. Ga. 1971) (upholding Georgia's law); Stephens v. Yeomans, 327 F. Supp. 1182, 1188 (D.N.J. 1970) (holding that New Jersey's felon disfranchisement law violated equal protection because it created "irrational and inconsistent" classifications); Beacham v. Braterman, 300 F. Supp. 182, 183–84 (S.D. Fla.) (upholding Florida's felon disfranchisement law), *aff'd mem.*, 396 U.S. 12 (1969); Emery v. State of Montana, 580 P.2d 445, 449 (Mont. 1978) (upholding Montana's law). See Behrens et al., *supra* note 34, at 564–66, 591, for a catalogue of legislative changes in this period. The 1960s and 1970s marked a significant period of change as many states liberalized their disfranchisement laws and removed bans that extended beyond completion of sentence. *Id.*

89. *See, e.g.*, Muntaqim v. Coombe, 366 F.3d 102, 115 (2d Cir. 2004), *peti-*

Courts have generally upheld felon disfranchisement laws, while some state legislatures have amended their laws.

1. The Supreme Court and the Fourteenth Amendment's "Affirmative Sanction" of Felon Disfranchisement

The U.S. Supreme Court first addressed the constitutionality of felon disfranchisement in 1974.[90] In *Richardson v. Ramirez*, three men who had completed their sentences for felony convictions challenged California's law that disfranchised past completion of sentence.[91] The California Supreme Court invalidated the law, holding that it did not serve the state's claimed interest of preventing electoral fraud.[92] The U.S. Supreme Court reversed, however, and upheld the constitutional-

tion for cert. filed, 2004 WL 1752185 (U.S. July 21, 2004) (No. 04-175); Cotton v. Fordice, 157 F.3d 388, 392 (5th Cir. 1998) (upholding Mississippi's law); Baker v. Pataki, 85 F.3d 919, 921 (2d Cir. 1996) (en banc) (splitting evenly on whether a challenge to New York's law stated a claim under the Voting Rights Act); Hayden v. Pataki, No. 00 Civ. 8586, 2004 WL 1335921, at *5 (S.D.N.Y. June 14, 2004) (dismissing a challenge asserting that New York's law violated the Voting Rights Act); Johnson v. Bush, 214 F. Supp. 2d 1333, 1343–44 (S.D. Fla. 2002) (granting summary judgment to the State in a challenge to Florida's law), *aff'd in part, rev'd in part sub nom.* Johnson v. Governor of Florida, 353 F.3d 1287, 1308 (11th Cir. 2003), *vacated en banc by* 377 F.3d 1163 (11th Cir. 2004); Jones v. Edgar, 3 F. Supp. 2d 979, 981 (C.D. Ill. 1998) (holding that an inmate's challenge to Illinois's law under the Fifteenth Amendment was nonmeritorious); Farrakhan v. Locke, 987 F. Supp. 1304 (E.D. Wash. 1997), *rev'd sub nom.* Farrakhan v. Washington, 338 F.3d 1009, 1020 (9th Cir. 2003) (reversing the district court's grant of summary judgment in favor of the State of Washington), *reh'g denied by* 359 F.3d 1116 (9th Cir. 2004), *petition for cert. filed*, (U.S. May 24, 2004) (No. 13-1597); Perry v. Beamer, 933 F. Supp. 556, 560 (E.D. Va.) (granting the state's motion to dismiss a challenge to Virginia's law), *aff'd mem.*, 99 F.3d 1130 (4th Cir. 1996); McLaughlin v. City of Canton, 947 F. Supp. 954, 976 (S.D. Miss. 1995) (holding that Mississippi could not disfranchise for a misdemeanor conviction); Fischer v. Governor, 749 A.2d 321, 330 (N.H. 2000) (reversing the lower court and disfranchising New Hampshire inmates); Mixon v. Commonwealth, 759 A.2d 442, 451–52 (Pa. Commw. Ct. 2000) (holding the Pennsylvania Voting Rights Act of 1995 unconstitutional as applied to persons who have completed their sentences), *aff'd mem.*, 783 A.2d 763 (Pa. 2001).

90. Richardson v. Ramirez, 418 U.S. 24 (1974). While *Ramirez* marked the first time the Court addressed felon disfranchisement as a whole, it previously upheld disfranchisement for polygamy. Davis v. Beason, 133 U.S. 333, 348 (1890), Murphy v. Ramsey, 114 U.S. 15, 44–45 (1885), Beacham v. Braterman, 300 F. Supp. 182 (S.D. Fla. 1969), *aff'd mem.*, 396 U.S. 12 (1969) (upholding disfranchisement past completion of sentence in Florida).

91. Richardson v. Ramirez, 418 U.S. 24, 30–32 (1974).

92. Ramirez v. Brown, 507 P.2d 1345, 1351–56 (Cal. 1973) (holding that the law violated the equal protection clause of the Fourteenth Amendment), *rev'd sub nom.* Richardson v. Ramirez, 418 U.S. 24 (1974).

ity of the law. The Court looked to the text of Section Two of the Fourteenth Amendment,[93] which reads, in pertinent part:

> [W]hen the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime,* the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.[94]

The Court pointed to the language "or other crime" and concluded that disfranchisement "has an affirmative sanction" in the Fourteenth Amendment.[95] The Court held that restrictions on the right to vote in this context therefore do not merit the same strict scrutiny standard of review as other restrictions on the right to vote receive.[96]

Although the Court upheld the practice of felon disfranchisement, it carved out an exception a decade later. In *Hunter v. Underwood*, the Court held that disfranchisement is unconstitutional under the Fourteenth Amendment if based upon an intent to racially discriminate.[97] The plaintiffs in *Hunter* challenged Alabama's disfranchisement law, which was revised at the state's 1901 constitutional convention to include any crime of "moral turpitude."[98] Participants at the all-white convention evidenced a clear intent to reduce the voting power of African Americans, and the disfranchisement law was one of these manipulations,[99] thus offering proof of an unambiguous discriminatory intent.

Intent of discrimination is difficult to prove, and few records provide a case as clear as Alabama in 1901. Even when a claim based upon racial intent is successful, however, the victory is somewhat limited. The *Hunter* decision, for example, did not invalidate Alabama's felon disfranchisement law as a whole, and the state continues to disfranchise beyond comple-

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93. *Ramirez*, 418 U.S. at 54.

94. U.S. CONST. amend. XIV, § 2 (emphasis added).

95. *Ramirez*, 418 U.S. at 54. See *infra* notes 135–141 and accompanying text for challenges to the Court's interpretation of Section Two.

96. *Id.* at 55; *cf. supra* notes 22–24 and accompanying text (discussing the high judicial protection of the right to vote).

97. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

98. *Id.* at 223–24. See *supra* note 85 for a discussion of the context in which the state altered its disfranchisement law.

99. *See supra* note 85.

tion of sentence.[100]

2. Post-*Ramirez* Challenges to Felon Disfranchisement

Challenges to felon disfranchisement laws have been rooted in a multitude of constitutional grounds. The most recurring challenges allege violations of the Fourteenth and Fifteenth Amendments,[101] as well as section 2 of the Voting Rights Act.[102] More than one-third of states have faced a challenge to

100. ALA. CODE § 17-3-9 (2002). *Hunter* only had the effect of invalidating the new "moral turpitude" aspect of disfranchisement passed in 1901, where there was clear evidence of a discriminatory motive. Upon application for restoration of rights, applicants must submit to a full investigation and hearing held by the State Board of Pardon and Paroles. David White, *Riley Rejects Felon Voting Bill*, BIRMINGHAM NEWS, June 25, 2003, at 1A; *see also* NKECHI TAIFA, ADVANCEMENT PROJECT, RE-ENFRANCHISEMENT! A GUIDE FOR INDIVIDUAL RESTORATION OF VOTING RIGHTS IN STATES THAT PERMANENTLY DISENFRANCHISE FORMER FELONS 30 (2002). Additionally, some applicants must provide a DNA sample. ALA. CODE § 36-18-24 (2002). The whole process may take as long as two years and understaffing problems have exacerbated the timeframe. White, *supra*. When one applicant tried to procure a DNA sample, he reported being told that the state operated only four locations, one of which ran tests only one hour per month. Katz, *supra* note 82. Alabama's governor recently signed a bill to streamline the restoration process, but restoration is still not automatic. THE SENTENCING PROJECT, *supra* note 25, at 2.

101. *See, e.g.*, Woodruff v. Wyoming, 49 Fed. Appx. 199, 201 (10th Cir. 2002); Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998); Baker v. Pataki, 85 F.3d 919, 924 (2d Cir. 1996); Wesley v. Collins, 791 F.2d 1255, 1257 (6th Cir. 1986); Johnson v. Bush, 214 F. Supp. 2d 1333, 1335 (S.D. Fla. 2002), *aff'd in part, rev'd in part sub nom.* Johnson v. Governor of Florida, 353 F.3d 1287, 1308 (11th Cir. 2003), *vacated en banc by* 377 F.3d 1163 (11th Cir. 2004); Jones v. Edgar, 3 F. Supp. 2d 979, 980 (C.D. Ill. 1998). For a challenge brought under a state constitution, see *NAACP v. Harvey*, UNN-C-4-04 (N.J. Super. Ct. Ch. Div. June 30, 2004) (letter opinion on file with author). To a lesser extent, plaintiffs have asserted that disfranchisement violates the First, Eighth, and Twenty-fourth Amendments. For a challenge under the First Amendment, see, for example *Johnson*, 214 F. Supp. 2d at 1338 (arguing that losing the right to vote impedes on free speech). See also Winkler, *supra* note 49, at 334–40, for a discussion of voting as a form of political speech. For claims under the Eighth Amendment, see *Woodruff*, 49 Fed. Appx. at 201 (arguing that disfranchisement is cruel and unusual punishment); *Farrakhan v. Locke*, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997) (discussing the same); *McLaughlin v. City of Canton*, 947 F. Supp. 954, 961 (S.D. Miss. 1995) (arguing that disfranchisement for conviction of a misdemeanor is cruel and unusual punishment). *See generally* Thompson, *supra* note 71 (arguing that felon disfranchisement violates the Eighth Amendment). For a challenge under the Twenty-fourth Amendment, see *Johnson*, 214 F. Supp. 2d at 1342 (likening the restoration process to a poll tax), and *Howard v. Gilmore*, 205 F.3d 1333 (4th Cir. 2000) (unpublished table decision). *See also* J. Whyatt Mondesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & C.R. L. REV. 435 (2001).

102. Farrakhan v. Washington, 338 F.3d 1009, 1010 (9th Cir. 2003), *reh'g denied by* 359 F.3d 1116 (9th Cir. 2004), *petition for cert. filed*, (U.S. May 24,

their disfranchisement laws at some point.[103] Despite the breadth of these challenges, few have been successful,[104] and no court has completely abolished a state's practice of disfranchising for a felony conviction. Courts have adhered rather rigidly to the *Ramirez* decision, and its precedent has thus far remained untouched. For equal protection challenges, courts rely on Section Two of the Fourteenth Amendment and *Ramirez* rather than analyzing felon disfranchisement under the strict scrutiny standard traditionally applied in cases concerning a fundamental right.[105]

a. Challenging Felon Disfranchisement Under Section 2 of the Voting Rights Act

While the challenge in *Ramirez* was not based on race, challenges under section 2 of the Voting Rights Act have been equally unsuccessful, although courts have varied on whether, and how, the Act should apply.

In *Wesley v. Collins*, the first challenge under the Act's 1982 amendment, the Sixth Circuit implicitly held that the Voting Rights Act applies to felon disfranchisement, but still held that, despite its disparate racial impact, Tennessee's law did not violate the Act.[106] The court held that a section 2 totality of the circumstances analysis required proof of a causal

2004) (No. 13-1597); *Baker*, 85 F.3d at 920; *Wesley*, 791 F.2d at 1257; *Johnson*, 214 F. Supp. 2d at 1335.

103. These states are Alabama, California, Florida, Georgia, Illinois, Mississippi, Montana, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, Texas, Virginia, Washington, and Wyoming. *See supra* notes 88–89, 101.

104. Among the successful challenges to felon disfranchisement laws are *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (holding disfranchisement unconstitutional if based on an intent to discriminate racially); *Farrakhan*, 338 F.3d at 1020 (reversing the district court's summary judgment for the State of Washington); *McLaughlin*, 947 F. Supp. at 973 (holding that disfranchisement for a misdemeanor violates equal protection); *Stephens v. Yeomans*, 327 F. Supp. 1182, 1188 (D.N.J. 1970) (holding New Jersey's law violated equal protection); and *Mixon v. Commonwealth*, 759 A.2d 442, 451–52 (Pa. Commw. Ct. 2000) (precluding Pennsylvania from disfranchising beyond sentence only those who were not registered to vote prior to incarceration), *aff'd mem.* 783 A.2d 763 (Pa. 2001). See also *supra* notes 88–89 for a catalogue of decisions.

105. See *McLaughlin*, 947 F. Supp. at 975, for a rare exception. Because the law at issue in *McLaughlin* disfranchised based on a misdemeanor conviction (instead of a felony), the court held that a strict scrutiny standard of review was appropriate. *Id.* Analyzing Section Two of the Fourteenth Amendment, the court held that the language, "or other crime" applied only to felonies, and thus *Ramirez* did not control the decision. *Id.*

106. Wesley v. Collins, 791 F.2d 1255, 1261–62 (6th Cir. 1986).

connection between race and disfranchisement, and no such relationship was evident.[107]

A decade later, in *Baker v. Pataki*, plaintiffs challenged New York's disfranchisement law, arguing that its disparate impact on African Americans and Latinos violated the Voting Rights Act.[108] The Second Circuit, en banc, split evenly on whether the Act provides a cause of action for challenges to felon disfranchisement.[109] Half of the panel believed that Congress did not "unmistakably" intend for the 1982 amendment to the Act to apply in the context of felon disfranchisement,[110] while the other half disagreed. More recently, in April 2004, the Second Circuit held that the Voting Rights Act does not apply to felon disfranchisement laws.[111]

i. The Voting Rights Act and the "Totality of the Circumstances"

In 2003, the Ninth Circuit gave credence to the oft-rejected challenge under the Voting Rights Act, a decision that may provide impetus for change in future court decisions. In *Farrakhan v. Washington*, the plaintiffs claimed that Washington's disfranchisement beyond completion of sentence constituted denial of the right to vote based on race.[112] Because of racial disparities within the state's criminal justice system,[113] the complaint asserted that the totality of the circumstances relating to felon disfranchisement in Washington effectively violated section 2 of the Voting Rights Act.[114]

While the district court granted summary judgment in favor of the State,[115] the Ninth Circuit reversed.[116] The district

107. *Id.* at 1262 ("[T]he disproportionate impact suffered . . . does not 'result' from the state's qualification . . . and thus the Tennessee Act does not violate the Voting Rights Act.")

108. 85 F.3d 919 (2d. Cir. 1996).

109. *Id.* at 921.

110. *Id.* at 922.

111. Muntaqim v. Coombe, 366 F.3d 102, 115 (2d Cir. 2004), *petition for cert. filed*, 2004 WL 1752185 (U.S. July 21, 2004) (No. 04-175).

112. Farrakhan v. Washington, 338 F.3d 1009, 1011 (9th Cir. 2003), *reh'g denied by* 359 F.3d 1116 (9th Cir. 2004), *petition for cert. filed*, (U.S. May 24, 2004) (No. 13-1597).

113. *Id.* ("Plaintiffs presented statistical evidence of the [racial] disparities in arrest, bail and pre-trial release rates, charging decisions, and sentencing outcomes in certain aspects of Washington's criminal justice system.").

114. *Farrakhan*, 338 F.3d at 1011.

115. Farrakhan v. Locke, No. CS-96-76-RHW, 2000 U.S. Dist. LEXIS 22212 (E.D. Wash. Dec. 1, 2000).

court acknowledged the petitioners' compelling evidence of a racial bias within the state's criminal justice system, but focused on disfranchisement in isolation, noting that the law applied equally to all convicted of a felony without regard to race and was not by itself discriminatory.[117] According to the Ninth Circuit, the results-based standard of the Act necessitates consideration of "how a challenged voting practice *interacts with* external factors such as 'social and historical conditions' to result in denial of the right to vote on account of race or color."[118] The district court therefore erred in excluding racial disparity in the criminal justice system from its analysis under the Voting Rights Act.[119]

In reaching this decision, the Ninth Circuit appears to have opened a door that previous courts have closed with regard to challenges under the Voting Rights Act. Because the Ninth Circuit acknowledged that courts must consider social and historical conditions in relation to felon disfranchisement laws, the disparate impact of these laws takes on new importance. Given the historical origins of felon disfranchisement in the United States, the substantial growth of the practice following the legal enfranchisement of all citizens,[120] and the existence of widespread biases within state criminal justice systems,[121] the Ninth Circuit's approach creates a new and important route for challenges to disfranchisement laws under the Voting Rights Act.

In a challenge to Florida's disfranchisement law, a panel of the Eleventh Circuit reached the same conclusion as the Ninth Circuit.[122] The court recently vacated that decision, however,

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116. *Farrakhan*, 338 F.3d at 1009.

117. *Farrakhan*, 2000 U.S. Dist. LEXIS 22212, at *9–10, *14. The court noted that "[a]t most, [evidence of discrimination in the criminal justice system] establishes a flaw with the criminal justice system, not with the disfranchisement provision." *Id.* at *10.

118. *Farrakhan*, 338 F.3d at 1011–12 (citing Thornburg v. Gingles, 478 U.S. 30, 47 (1986)).

119. *Id.* at 1012.

120. *See supra* notes 37–44, 84–86 and accompanying text.

121. *See supra* notes 77–81 and accompanying text.

122. Johnson v. Governor of Florida, 353 F.3d 1287 (11th Cir. 2003), *vacated en banc by* 377 F.3d 1163 (11th Cir. 2004). In applying the Act, the district court had looked to *Wesley* for guidance and agreed that "there must be a nexus between the discriminatory exclusion of blacks . . . and the disfranchisement of felons." Johnson v. Bush, 214 F. Supp. 2d 1331, 1341 (S.D. Fla. 2002) *aff'd in part, rev'd in part sub nom.* Johnson v. Governor of Florida, 353 F.3d 1287, 1308 (11th Cir. 2003), *vacated en banc by* 377 F.3d 1163 (11th Cir.

and the case will soon be reconsidered by the court en banc.[123]

3. Recent Legislative Changes to State Felon Disfranchisement Laws

While legal challenges to felon disfranchisement have rarely been successful, some state legislatures have amended their disfranchisement laws. Within the past nine years, eight states have altered their laws in ways that will theoretically facilitate restoration of voting rights.[124] For example, Connecticut enfranchised probationers and Delaware, Maryland, and Wyoming amended their laws to eliminate indefinite disfranchisement for some classes of felons.[125] Nevada eased its process for both first-time offenders and recidivists, New Mexico and Texas now restore voting rights upon completion of sentence, and Virginia eased some barriers in its restoration process.[126]

Not all quests for reform in this area, however, have been successful or easily attained. In 2003, Alabama legislators reached a compromise to restore voting rights upon completion of sentence, but Governor Bob Riley pocket-vetoed the bill, sparking protests.[127] In 2002, a bill to restore voting rights to felons for federal elections failed in the U.S. Senate.[128] Simi-

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2004). Moreover, the court stated that any disparate impact resulting from racism in the state's criminal justice system "is irrelevant to the voting rights challenge." *Id.* at 1341–42. The Eleventh Circuit panel held that the court erred by failing to consider how felon disfranchisement laws interacted with social and historical circumstances. *Johnson*, 353 F.3d at 1305.

123. *Johnson*, 377 F.3d 1163 (11th Cir. 2004) (en banc) (vacating the panel's decision).

124. STEVEN KALOGERAS, THE SENTENCING PROJECT, LEGISLATIVE CHANGES ON FELONY DISENFRANCHISEMENT, 1996–2003, at 1 (Marc Mauer ed. 2003) *available at* http://www.sentencingproject.org/pdfs/legchangesreport.pdf. The use of "theoretically" acknowledges that while some states may change their processes of restoring rights, the changes may not necessarily enfranchise more people. For example, elimination of a waiting period to *apply* for restoration may have little impact if the rest of the restoration process remains intact. Further, even though states draw more lines between violent and non-violent felonies, they still have the power to redefine crime and encompass more offenses under the umbrella of "violent." *See supra* note 56.

125. KALOGERAS, *supra* note 124, at 1.

126. *Id.*

127. *See, e.g.*, Jannell McGrew, *Protesters Brave Heat to Criticize Governor*, MONTGOMERY ADVERTISER, July 19, 2003, at A1; White, *supra* note 100. The governor later signed a different bill intended to streamline the restoration process. THE SENTENCING PROJECT, *supra* note 25, at 2.

128. H.R. 5510, 107th Cong. (2002); 148 CONG. REC. S565 (daily ed. Feb. 14, 2002). Two similar bills have been reintroduced in Congress. H.R. 259, 108th Cong. (2003); H.R. 1433, 108th Cong. (2003).

larly, a handful of states have adopted, or attempted to adopt, more restrictive felon disfranchisement laws in recent years. Kansas, for example, disfranchised probationers in 2002 and Utah and Massachusetts recently disfranchised prison inmates.[129] Legislators in South Carolina sought, but failed, to change its law to remove voting rights for fifteen years after completion of sentence; the state presently restores voting rights upon completion of sentence.[130]

II. RECONCILING VOTING AS A FUNDAMENTAL RIGHT AND FELON DISFRANCHISEMENT LAWS

In light of voting's status as a fundamental right and the increasing protection that right has received, felon disfranchisement laws stand as a large exception. An examination of the history and development of felon disfranchisement laws in the United States, the debates over the laws, and the treatment they receive from courts and legislatures indicates that voting is not quite the fundamental right that many take for granted. How have felon disfranchisement laws survived? This question inevitably raises several other issues, including how courts evaluate these restrictive laws, how they should evaluate them, and how the same arguments fare in front of judicial and legislative decisionmakers.

A. EVALUATING FELON DISFRANCHISEMENT LAWS AS AN INFRINGEMENT ON THE FUNDAMENTAL RIGHT TO VOTE

Although the Supreme Court has repeatedly held that restrictions on the right to vote are subject to a strict scrutiny standard of review,[131] the Court exempted felon disfranchisement laws from such review in *Richardson v. Ramirez*.[132] Thus,

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129. KALOGERAS, *supra* note 124, at 1. The change in Kansas stemmed from state legislative action, while the amendments in Utah and Massachusetts were constitutional amendments approved by the state electorate. *Id.* at 3, 4–5.

130. Warren Wise, *Criminal Example Upsets Lawmakers*, POST & COURIER, Feb. 15, 2001, at B1 [hereinafter Wise, *Criminal Example*]; Warren Wise, *House Doesn't Kill Bill to Delay Felons Voting*, POST & COURIER, Feb. 16, 2001, at A3 [hereinafter Wise, *House Doesn't Kill Bill*].

131. *See supra* notes 23–24 and accompanying text.

132. Richardson v. Ramirez, 418 U.S. 24, 54 (1974). The Court held that the plain language in Section Two of the Fourteenth Amendment "is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court." *Id.* See *supra* notes 90–96 and accompanying text for a

few decisions since *Ramirez* have given the issue a meaningful analysis beyond citing to *Ramirez* and recognizing the narrow exception in *Hunter v. Underwood*.[133] The *Ramirez* Court's interpretation of the Fourteenth Amendment, however, has been subject to criticism for its "unsound historical analysis."[134]

The Court took the text of Section Two on its face, arguing that it remained in force, as a qualification to Section One, and supported disfranchisement.[135] Although the Court insisted the history of the Fourteenth Amendment was not important,[136] the context in which it arose and subsequent interpretations yielded a different conclusion.[137] Section Two addressed states seeking re-admission to the Union following the Civil War and sought to penalize—by reducing congressional representation—states that continued to deny the right to vote to African Americans.[138] A joint committee added the Section Two lan-

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discussion of *Ramirez* and Section Two of the Fourteenth Amendment. *See also* Owens v. Barnes, 711 F.2d 25, 27 (3d Cir. 1983) ("[T]he right of convicted felons to vote is not 'fundamental.'").

133. *See, e.g.*, Woodruff v. Wyoming, 49 Fed. Appx. 199, 203 (10th Cir. 2002); Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998); Johnson v. Bush, 214 F. Supp. 2d 1333, 1335 (S.D. Fla. 2002), *aff'd in part, rev'd in part sub nom.* Johnson v. Governor of Florida, 353 F.3d 1287, 1308 (11th Cir. 2003), *vacated en banc by* 377 F.3d 1163 (11th Cir. 2004). See *supra* notes 97–99 and accompanying text for a discussion of *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding unconstitutional felon disfranchisement based upon a racially discriminatory intent).

134. *Ramirez*, 418 U.S. at 56 (Marshall, J., dissenting); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 13–16 (2d ed. 1988) (calling the *Ramirez* Court's interpretation "fundamentally misconceived"); Fletcher, *supra* note 48, at 1900–02.

135. *Ramirez*, 418 U.S. at 55.

136. *Id.* at 54.

137. *See* William W. Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 43–44. Van Alstyne discusses the legislative history of the Fourteenth Amendment, noting that Sections One and Two were originally two separate constitutional amendments and that Section Two "was designed primarily to meet a particular, separable, and immediate problem of protecting the Republican hegemony in Congress." *Id.*

138. JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 123 (1997) (pointing to the dilemma Section Two put to Southern states: "give blacks the vote (an unthinkable choice) or lose representation in Congress (an unacceptable choice)"); *see also* Fletcher, *supra* note 48, at 1901 (discussing the "paradox of disenfranchisement," and noting that "a constitutional provision designed in 1868 to improve the political representation of blacks has turned out . . . to have precisely the opposite effect").

guage "or other crime" without explanation,[139] and there is no affirmative evidence that this language was to have meaning outside the context of the section.[140] Further, history indicates that Section Two's threat of reduced representation was never enforced.[141] Thus, while the plain text of Section Two may at first appear to sanction felon disfranchisement, a closer look at the context of the Section reveals that it had a limited historical purpose and the phrase "or other crime" should not be interpreted in this manner.

The *Ramirez* Court also gave weight to the fact that some states disfranchised for crimes at the time of the Fourteenth Amendment.[142] This observation is unremarkable, however, because the Court has rendered unconstitutional multiple limitations on suffrage that were in effect at that time.[143] Similarly,

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139. *See* Itzkowitz & Oldak, *supra* note 27, at 746–47 n.158.

140. *Ramirez*, 418 U.S. at 74 (Marshall, J., dissenting) ("Section 2 provides a special remedy—reduced representation—to cure a particular form of electoral abuse—the disfranchisement of Negroes.").

Prior to *Ramirez*, the Second Circuit upheld felon disfranchisement, also relying on Section Two of the Fourteenth Amendment. Green v. Bd. of Elections, 380 F.2d 445, 452 (2d Cir. 1967). Itzkowitz and Oldak attacked this basis, arguing that:

> [Section Two's] crucial words 'or other crimes' are utterly devoid of independent legislative intent, and take on historical meaning only as part of the phrase 'participation in rebellion, or other crime.' It is clear that the thrust of this language was to limit governmental activity by former rebels. . . . There is no apparent legislative intent for this addition [of 'or other crimes'], and it make sense only as giving states a broader weapon to use against former Confederates.

Itzkowitz & Oldak, *supra* note 27, at 746 n.158 (citations omitted).

141. *See, e.g.*, Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587, 591 n.26 (2001) ("Despite its sweeping language, Section 2 turned out to be toothless because neither Congress nor the courts ever showed themselves willing to pull the trigger.").

142. *Ramirez*, 418 U.S. at 48. The Court noted that since states were readmitted to the Union with these provisions in place, Congress affirmatively approved of criminal disfranchisement. *Id.* at 48–49.

143. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 353 (1972) (prohibiting durational residency requirements); Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966) (striking down poll taxes). Interestingly, the *Ramirez* majority cites dicta in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 51 (1959) (upholding literacy tests as a prerequisite to voting) as support for its holding, *Ramirez*, 418 U.S. at 53, when section 4 of the Voting Rights Act of 1965 clearly overruled the *Lassiter* decision just six years later. Voting Rights Act of 1965, Pub. L. No. 89-110 § 4 79 Stat. 438–39 (codified as amended at 42 U.S.C. § 1973b (2000)) (prohibiting the use of "tests" or "devices" specifically requiring voters to "demonstrate the ability to read, write, understand, or interpret any matter [or] demonstrate any educational achievement or his

conceptions of who should be able to vote have changed in important ways since 1868. Section Two allowed states to deny the right to vote based on race, albeit with a penalty, but two years later the Fifteenth Amendment explicitly eliminated that choice, thus rendering Section Two inoperative.[144] Section Two also excluded from penalty states that disfranchised women and those less than twenty-one years of age.[145] As the Court has noted, "[i]n determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality."[146]

Because none of the text within Section Two remains current, courts should analyze felon disfranchisement laws as any other restriction on the right to vote—an infringement of a fundamental right. This perspective triggers a strict scrutiny standard of review, under which a state may disfranchise for a felony conviction only if the restriction is narrowly tailored to a compelling state interest.[147] Further, courts examining race-based challenges to felon disfranchisement should use a broader conception of the totality of the circumstances standard under section 2 of the Voting Rights Act, as articulated by the Ninth Circuit in *Farrakhan v. Washington*.[148] When analyzing the laws within the framework of voting as a fundamental right and acknowledging the connection between race and disfranchisement, it becomes clear that felon disfranchisement laws cannot withstand such scrutiny.

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knowledge of any particular subject"); *see also* Katzenbach v. Morgan, 384 U.S. 641, 658 (1966) (upholding section 4(e) of the Voting Rights Act and striking down New York's requirement that voters be able to read and write English).

In his dissent, Justice Marshall also pointed to *Oregon v. Mitchell*, 400 U.S. 112 (1970), in which the Court permitted Congress to lower the voting age in federal elections to eighteen, despite the language in Section Two of the Fourteenth Amendment. *Ramirez*, 418 U.S. at 75 (Marshall, J., dissenting).

144. *See, e.g.*, HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 98 (1908) (noting that Section Two "has never had any effect whatever [sic] since it became a part of the fundamental law of the land. . . . due . . . to the fact that the Fifteenth Amendment practically superceded it, or, as some have said, nullified it"); *see also* Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108 (1960); Gabriel J. Chin, *Reconstruction and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth?*, 92 GEO. L.J. 259 (2004).

145. These options were eliminated by the Nineteenth and Twenty-sixth Amendments, respectively. U.S. CONST. amends. XIX and XXVI.

146. *Harper*, 383 U.S. at 669.

147. *See supra* notes 22–24 and accompanying text.

148. *See supra* notes 11–14, 76–81 and accompanying text.

1. Felon Disfranchisement Laws Fail Review under Strict Scrutiny and the Voting Rights Act

Two reasons should bring felon disfranchisement challenges under a stricter standard of review. First, the challenges concern the general, fundamental right to vote, and second, many of the claims allege vote denial or dilution based on race.[149] Under either approach, the laws fail to withstand review. Even assuming states have legitimate, or perhaps compelling, state interests with respect to regulating suffrage qualifications, the means by which felon disfranchisement laws serve those interests are overinclusive and only tenuously related. Courts should therefore add felon disfranchisement to the catalogue of restrictions that states may no longer impose on the right to vote.

a. Limitations of the Argument for Disfranchising Based on a Felony Conviction

As the Warren Court elevated the right to vote to the status of a fundamental right in the 1960s,[150] the Court repeatedly alluded to why the right merits so much protection. In short, voting preserves all other rights and is central to the no-

149. *See, e.g.*, Johnson v. Bush, 214 F. Supp. 2d 1333, 1335 (S.D. Fla. 2002), *aff'd in part, rev'd in part sub nom.* Johnson v. Governor of Florida, 353 F.3d 1287, 1308 (11th Cir. 2003), *vacated en banc by* 377 F.3d 1163 (11th Cir. 2004); Farrakhan v. Locke, 987 F. Supp. 1304 (E.D. Wash. 1997), *rev'd sub nom.* Farrakhan v. Washington, 338 F.3d 1009, 1020 (9th Cir. 2003), *reh'g denied by* 359 F.3d 1116 (9th Cir. 2004), *petition for cert. filed*, (U.S. May 24, 2004) (No. 13-1597); Wesley v. Collins, 605 F. Supp. 802, 804 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986). Voter denial refers to the individuals disfranchised, while voter dilution refers to the diminished voting strength of minority communities. *See* Shapiro, *supra* note 81, at 555–60 (arguing that challengers to disfranchisement laws have "good reasons to allege both vote denial and vote dilution, and to do so in separate counts").

Several have challenged the distinctions between which classes of persons a law disfranchises. *See, e.g.*, Owen v. Barnes, 711 F.2d 25, 25–26 (3d Cir. 1983) (holding there was no equal protection violation for treating incarcerated and unincarcerated persons differently); Mixon v. Commonwealth, 759 A.2d 442, 451 (Pa. Commw. Ct. 1999) (upholding differential disfranchisement of incarcerated and unincarcerated persons, but finding no rational basis for treating those who had completed their sentences differently based on being a registered voter prior to incarceration); *see also* Jill E. Simmons, Comment, *Beggars Can't Be Voters: Why Washington's Felon Re-Enfranchisement Law Violates the Equal Protection Clause*, 78 WASH. L. REV. 297 (2003) (arguing that requiring a fee to apply for restoration of voting rights unconstitutionally distinguishes between similarly-situated persons based on wealth).

150. *See supra* notes 11–23 and accompanying text.

tion of a democracy; without equal access to the ballot, the government is not one of the people, but rather one selected by an elite group deemed "worthy" enough to vote.[151] The Court has not, however, contended that states have no interests with regard to regulating elections. States typically argue that they have an interest in preventing electoral fraud,[152] maintaining the "purity" or integrity of the ballot box,[153] restricting the franchise to those who support or have an interest in the state itself,[154] and deterring future crime.[155] The Court has acknowledged the validity of some of these goals in relation to the right to vote,[156] but has generally found that states use these "formidable-sounding" interests as a guise to implement impermissible restrictions on the right to vote.[157] Yet states advance these same interests in support of felon disfranchisement and courts have validated them.[158] Such rationales, however, do not support these claimed interests in a manner superior to those means previously struck down.

i. Felon Disfranchisement Laws Do Not Prevent Electoral Fraud

While a state may claim that felon disfranchisement prevents electoral fraud, the total number of election-related

151. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969); Reynolds v. Sims, 377 U.S. 533, 555 (1964). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (arguing that the right to vote is central to a representative government).

152. *See generally* Ramirez v. Brown, 507 P.2d 1345 (Cal. 1973) (discussing California's stated purpose in relation to the historical use of voting restrictions claimed to prevent electoral fraud), *rev'd sub nom.* Richardson v. Ramirez, 418 U.S. 24 (1974).

153. *See* Washington v. State, 75 Ala. 582, 585 (1884).

154. *See, e.g.*, Green v. Bd. of Elections, 380 F.2d 445, 451–52 (2d Cir. 1967), *cited with approval* in Woodruff v. Wyoming, 49 Fed. Appx. 199, 203 (10th Cir. 2002); Baker v. Pataki, 85 F.3d 919, 930 (2d Cir. 1996); *Wesley*, 605 F. Supp. at 813; Fischer v. Governor, 749 A.2d 321, 329–30 (N.H. 2000).

155. *See, e.g.*, *Baker*, 85 F.3d at 930; *Green*, 380 F.2d at 451.

156. Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process.") (citing Rosario v. Rockefeller, 410 U.S. 752, 761 (1973)); Dunn v. Blumstein, 405 U.S. 330, 345 (1972) ("Surely the prevention of . . . fraud is a legitimate and compelling government goal.").

157. *Dunn*, 405 U.S. at 345; *see also, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 631–32 (1969) (holding that despite New York's interest in limiting school district elections to "interested" parties who are "directly affected," its law was not narrowly-tailored to serve that interest).

158. *See supra* notes 154–155.

crimes is negligible, and arguments regarding fraud are much more rhetorical than factual.[159] Previous commission of a felony does not logically lead to future commission of electoral fraud, nor does previous non-commission of a felony rule out the possibility of future electoral fraud;[160] one has no bearing on the other. When states have asserted electoral fraud in other contexts, the Court has held that speculative fears are not enough to support infringing upon a constitutional right.[161] Further, states have other workable means to prevent fraud.[162] Thus, disfranchisement for any felony conviction is not a narrowly-tailored route to achieve states' interests in preventing election fraud.

ii. Felon Disfranchisement Laws Do Not Protect the "Purity" of the Ballot Box

As a variation on the claimed interest of preventing electoral fraud, states have proposed an interest in preserving the "purity" of the ballot box. This argument takes several forms, generally focusing on either the overall integrity of the ballot or on a violation of the social contract. The "purity" aspect of the argument is particularly dangerous given the historical turns such a theory has followed. Historically, the same rationale was advanced for other exclusionary practices, such as poll taxes, literacy tests, and long residency requirements. States claimed that poll taxes ensured that only truly interested parties

159. MINNITE & CALLAHAN, *supra* note 71, at 14 (commenting that "[w]hile the issue of fraud is raised continually in discussion of election reform, to date there have been no major studies of election fraud in the United States"(emphasis omitted)). Minnite and Callahan conclude that "[o]verall, the disenfranchisement of voters through antiquated voting systems, errors, mismanagement of registration bases, and intimidation or harassment is a far bigger problem today than traditional forms of election fraud." *Id.* at 15. Their study covered twelve states and led to the conclusion that "[e]lection fraud appears to be very rare." *Id.* at 17.

160. Thompson, *supra* note 71, at 194. Noting that anyone is capable of committing an election offense, regardless of a prior felony conviction or past voting behavior, Thompson comments, "possession of the right to vote is not required to commit the majority of election offenses." *Id.*

161. *See, e.g.*, Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 210 (1999) (invalidating criteria for petition circulation).

162. *See, e.g.*, *Dunn*, 405 U.S. at 353 (noting that Tennessee punished election fraud in numerous ways, and thus the state's residency requirement was not narrowly tailored to this interest); *see also* Ramirez v. Brown, 507 P.2d 1345, 1351 (Cal. 1973) (discussing *Dunn* with approval and applying the same logic to felon disfranchisement), *rev'd sub nom.* Richardson v. Ramirez, 418 U.S. 24 (1974).

voted,[163] and that literacy tests and residency requirements ensured "intelligent use of the ballot."[164] The Court has invalidated all of these requirements. Therefore, invoking identical rationales in support of felon disfranchisement laws[165] should be suspect on similar grounds. While it is often argued that "purity" or integrity prevents fraud, the idea is vague and inherently signals that some groups are more worthy of the right to vote than others. As a matter of democratic principal, one should be wary of assigning worth to members of the electorate.[166]

Rhetorically, it is easy to paint a vivid picture of "rapists, murders, and robbers"[167] "corrupting" the ballot box. Behind these statements, however, lie many facts that cut against such broad disfranchisement for all felony convictions. First, persons convicted of the above-listed crimes comprise less than one-third of those in prison;[168] thus, the imagery of most people with felony convictions as a violent group does not match reality. Second, laws that disfranchise millions to punish such a small group are hardly narrowly-tailored. Although commission of a crime may potentially signal a questionable character, de-

163. Harper v. Va. Bd. of Elections, 383 U.S. 663, 676–77 (1966) (Black, J., dissenting).

164. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959); *accord Dunn*, 405 U.S. at 360.

165. *See, e.g.*, Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986); Shepherd v. Trevino, 575 F.2d 1110 (5th Cir. 1978); Green v. Bd. of Elections, 380 F.2d 445 (2d Cir. 1967).

166. For this same reason, states are no better-off when they make distinctions in disfranchising differently based on classification of a crime as violent or non-violent, or recidivism. *See, e.g.*, MD. CODE ANN., ELECTION LAW § 3-102(b) (2003); NEV. REV. STAT. ANN. 213.157 (Michie 2003); *see also* ELY, *supra* note 151, at 120 ("We cannot trust the ins to decide who stays out, and it is therefore incumbent on the courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason . . . it had better be a very convincing one.").

167. 148 CONG. REC. S802 (daily ed. Feb. 14, 2002) (statement of Sen. McConnell). In a debate over whether to enfranchise all who had completed their sentences in federal elections, Senator Mitchell McConnell (R-Ky.) argued against the measure, commenting:

> We are talking about rapists, murderers, robbers, and even terrorists or spies. Do we want to see convicted terrorists who seek to destroy this country voting in elections? Do we want to see convicted spies who cause great damage to this country voting in elections? Do we want to see "jailhouse blocs" banding together to oust sheriffs and government officials who are tough on crime?

Id.

168. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at 499 (2002).

nying suffrage as a consequence should not be a valid option.

iii. Felon Disfranchisement Laws Do Not Protect a State's Interests

Another frequent claim by proponents of disfranchisement is that it protects the overall state and country from those who would otherwise vote in destructive ways.[169] The claim of protecting the state from "subversive" voters fails as related to felon disfranchisement. The general assumption that commission of a crime indicates a desire to subvert the state is flawed. Persons with a felony conviction are subject to the same laws and control as the rest of the voting-age population, perhaps more so. Decisions made by elected officials continue to affect their lives and families in myriad ways; to pretend otherwise is disingenuous.[170]

A felony conviction is not dispositive of one's political views. It is unlikely that crime policy is the sole reason that a voter supports a given candidate, nor does a conviction necessarily indicate a person's view regarding crime itself. That he or she will vote a straight "pro-crime" ticket is unlikely,[171] as is the chance that such candidates would win and subsequently sway enough legislators to change the law.[172] Further, were that situation to unfold, it would be the product of the larger democratic process, not that of people with felony convictions corrupting the ballot box or subverting state interests. The argument also presupposes that no crime-related policy is in need of change.

That criminal activity is the only widespread restriction on suffrage deemed worthy of disfranchisement is curious. Crime is not the only issue of interest in the country, and thus a felony conviction should not be considered the only act substantial enough to justify stripping away the right to vote. Further, the malleability of the term "felony" and what it encompasses should suggest that there is nothing inherent in criminal activity to justify losing the right to vote; two people committing the same act a few years apart in the same state may face drasti-

169. *See, e.g., supra* note 167 (comments of Sen. McConnell).

170. *See supra* note 157.

171. *See, e.g.*, Lucia Benaquisto & Peter J. Freed, *The Myth of Inmate Lawlessness: The Perceived Contradiction Between Self and Other in Inmates' Support for Criminal Justice Sanctioning Norms*, 30 LAW & SOC'Y REV. 481, 505 (1996).

172. *See supra* note 73 and accompanying text.

cally different consequences if a legislature reclassifies an offense. Moreover, for two similarly-situated people in different states, the consequences may differ vastly. Differences in state disfranchisement laws also produce seeming inequity: someone convicted of drug possession in Florida indefinitely loses the right to vote while someone convicted of first-degree murder in Vermont never loses the right to vote.

If states cannot trust persons convicted of a crime to vote in the public interest, perhaps those found liable in civil suits also will not vote in the interest of society. Tort liability, for example, may signal poor decision making, as could filing for bankruptcy or accumulating debt. Those with traffic tickets have disobeyed the law, and according to one official even that should bear on the right to vote.[173] A felony-level crime admittedly differs in severity from a traffic ticket or a civil judgment, but its relationship to suffrage remains as tenuous and illogical as the above examples.

As for the argument that criminal activity evidences a disinterest in the state, it is important to note the consistently low voter turnout by all eligible voters.[174] Any purported apathy toward states and government is not limited to persons with felony convictions. The blanket exclusion of this group because some would allegedly vote subversively is speculative, overinclusive, and not narrowly-tailored to any compelling state interest.[175] These rationales against enfranchisement do not hold up under strict scrutiny.

Moreover, the idea that anyone might vote subversively or for the "wrong" candidate or interest is inimical to the concept of a democracy and representative government. The Court has stated previously that "'[f]encing out' from the franchise a sec-

173. Thomas B. Pfankuch, *Clemency Board Very Cautious in Restoring Rights*, FLA. TIMES-UNION, June 3, 2001, *available at* http://www.jacksonville.com/tu-online/stories/060301/met_6339439.html (last visited Oct. 21, 2004) (quoting a chief cabinet aide to a board member who helps make clemency decisions in Florida: "[I]t's appropriate that the board would reject an application for something as minor as traffic tickets" because "[y]ou're breaking the law, you're not being a law-abiding citizen.").

174. Only slightly more than half of the voting-age population cast a vote in the 2000 presidential election. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 254 (122d ed. 2002). Elections below the presidential level yielded an even lower rate of participation. *Id.*

175. On the other hand, disfranchising only for a felony conviction could be viewed as underinclusive; surely persons with a felony conviction on their record are not the only group of people with ideas that others might consider undesirable.

tor of the population because of the way they may vote is constitutionally impermissible."[176] Although those disfranchised by felony convictions have committed a crime at some point in their lives, eliminating a large and growing population from having any right to vote undermines the concept of a representative government because states can restrict the size and representative nature of the electorate.

iv. Felon Disfranchisement Laws Do Not Serve as a Deterrent to Future Crime

Although early disfranchisement laws were rooted in the concepts of deterrence and retribution,[177] such rationales do not support modern forms of felon disfranchisement. The claimed deterrent effect of disfranchisement hinged primarily on the public nature of the loss of rights,[178] but with the formalization of the criminal justice system and the growth of the country as a whole, today there is not a comparable public aspect. While the broad range of collateral consequences retains the aspect of an internal stigma for those with a criminal conviction, their disfranchised status lacks the same public and individualized stigmatic attention that existed in the "small communities" of colonial America.[179] Further, a recent study suggests that there

176. Carrington v. Rash, 380 U.S. 89, 94 (1965) (invalidating a provision that prohibited members of the armed services from voting in Texas if stationed in the state). The *Carrington* Court further stated: "'The exercise of rights so vital to the maintenance of . . . institutions,' . . . cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents." *Id.* (quoting Schneider v. New Jersey, 308 U.S. 147, 161 (1939)). *See also* Thompson, *supra* note 71, at 195 (noting that the exclusion of "anti-social" voters mirrors historical rationales for excluding now-protected groups from voting).

177. *See supra* notes 29–31 and accompanying text.

178. *See supra* notes 26–31 and accompanying text.

179. *See* Itzkowitz & Oldak, *supra* note 27, at 753. Itzkowitz and Oldak comment that

> [t]he notion of lasting criminal taint, which justified the ancient practices of infamy, outlawry, and civil death, is no longer a viable one in our scheme of criminal justice. The idea of taint is not only repugnant to current conceptions of penology but is counterproductive to the rehabilitative ideal that underlies those conceptions. Yet the idea of taint is essential to the doctrine of the purity of the ballot box, a doctrine which *Green* and its progeny fasten upon as the primary justification for disenfranchisement. Flawed by its reliance on this outmoded concept, the purity of the ballot box is an interest too feeble to assert in support of disenfranchisement statutes.

Id. (footnotes omitted).

may be a link between voting and desistance from crime,[180] which should support the idea of enfranchising rather than disfranchising those convicted of crimes.

b. Reviewing Felon Disfranchisement Laws as a Violation of the Voting Rights Act

Perhaps one of the more troubling aspects of felon disfranchisement laws is the disproportionate impact that the laws have on the African American population.[181] Until *Farrakhan v. Washington*,[182] courts had denied race-based challenges under the Voting Rights Act any meaningful analysis. In denying these claims, courts have typically either resorted to the traditional principle that a disparate impact is not sufficient to show unconstitutionality,[183] focused only on the race-neutral text and application of felon disfranchisement laws,[184] or held that a racially discriminatory intent had dissipated with the passage of time.[185]

The 1982 amendment to the Voting Rights Act shifted from an intent-based to a results-based standard. Under the Act, a challenger must show that a practice related to voting creates a disparate impact and that, viewed under a totality of the circumstances, the practice dilutes or denies the right to vote based on race.[186] The 1982 amendment recognized the difficulty of proving a discriminatory intent and further recognized the persistence of an inadequate remedy to racially-motivated re-

180. Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. (forthcoming 2004). This exploratory study analyzed longitudinal survey data, finding general support for the idea that arrestees who vote are subsequently less likely to be re-arrested or incarcerated.

181. *See supra* notes 84–87 and accompanying text.

182. 338 F.3d 1009 (9th Cir. 2003), *reh'g denied by* 359 F.3d 1116 (9th Cir. 2004), *petition for cert. filed*, (U.S. May 24, 2004) (No. 13-1597).

183. *See, e.g.*, Johnson v. Bush, 214 F. Supp. 2d 1333 (S.D. Fla. 2002), *aff'd in part, rev'd in part sub nom.* Johnson v. Governor of Florida, 353 F.3d 1287, 1308 (11th Cir. 2003), *vacated en banc by* 377 F.3d 1163 (11th Cir. 2004); Wesley v. Collins, 605 F. Supp. 802 (M.D. Tenn. 1985), *aff'd* 791 F.2d 1255 (6th Cir. 1986).

184. *See, e.g.*, Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996); Farrakhan v. Locke, 987 F. Supp. 1304 (E.D. Wash. 1997), *rev'd sub nom.* Farrakhan v. Washington, 338 F.3d 1009, 1020 (9th Cir. 2003), *reh'g denied by* 359 F.3d 1116 (9th Cir. 2004), *petition for cert. filed*, (U.S. May 24, 2004) (No. 13-1597).

185. *See, e.g.*, Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998); *Johnson*, 214 F. Supp. 2d at 1339; *see infra* note 195.

186. *See supra* notes 10–14 and accompanying text.

strictions on suffrage.[187] Despite this change, courts have continued to reject felon disfranchisement challenges under the Voting Rights Act.[188]

In *Wesley v. Collins*,[189] the court essentially added a requirement to the Act in holding that its plaintiffs failed to show a causal connection between historical discrimination and the present law, noting that the law did not "bear the taint of historically-rooted discrimination."[190] In adding this requirement, the court nearly reverts back to the intent-based standard found in the pre-1982 version of the Voting Rights Act.[191] The court further stated that "[d]isenfranchising the felon never has been attributed to discriminatory exclusion of racial minorities from the polls."[192] District courts in Florida[193] and Mississippi[194] acknowledged racist intent in the original passage of their felon disfranchisement laws, yet found that because subsequent legislatures had retained the laws, this eliminated the discriminatory intent.[195]

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187. *See supra* notes 10–14 and accompanying text.

188. *E.g.*, Muntaqim v. Coombe, 366 F.3d 102, 115 (2d Cir. 2004), *petition for cert. filed* No. 04-175, 2004 WL 1752185 (U.S. July 21, 2004); Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996). *See generally Wesley*, 605 F. Supp. 802.

189. *See generally* 605 F. Supp. 802.

190. *Id.* at 812–13.

191. *See* Shapiro, *supra* note 81, at 551–52 (discussing the *Wesley* court's "misapplication" of the Voting Rights Act). Challenges under the Act prior to the 1982 amendment required proof of a discriminatory intent. City of Mobile v. Bolden, 446 U.S. 55, 65 (1980); *see also supra* notes 10–14 and accompanying text.

192. *Wesley*, 605 F. Supp. at 813.

193. Johnson v. Bush, 214 F. Supp. 2d 1333, 1339 (S.D. Fla. 2002), *aff'd in part, rev'd in part sub nom.* Johnson v. Governor of Florida, 353 F.3d 1287, 1308 (11th Cir. 2003), *vacated en banc by* 377 F.3d 1163 (11th Cir. 2004).

194. Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998).

195. In each of these cases, the courts held that although the initial passage of the states' respective felon disfranchisement laws may have been motivated by an intent to racially discriminate, that taint had dissipated since the laws were retained throughout substantial amendments to the states' codes and constitutions. *Johnson*, 214 F. Supp. 2d at 1339; *Cotton*, 157 F.3d at 391 (noting that "a "facially neutral provision . . . might overcome its odious origin"). *But cf.* Gabriel J. Chin, *Rehabilitating Unconstitutional Statutes: An Analysis of* Cotton v. Fordice, *157 F.3d 388 (5th Cir. 1998)*, 71 U. CIN. L. REV. 421, 437–38 (2002) (arguing that the *Cotton* court "got it exactly backwards").

i. Considering the Social and Historical Circumstances of Felon Disfranchisement Laws Under the "Totality of the Circumstances" Standard of the Voting Rights Act

In refusing to give challenges to felon disfranchisement laws a thorough results-based analysis under the Voting Rights Act that considers the totality of the circumstances, courts again differentiate the laws from every other restriction on the right to vote. The predominant error courts make is focusing on the text of felon disfranchisement laws, rather than on the surrounding processes that result in application of the law. Although couched in race-neutral language and facially applied in a race-neutral manner,[196] courts must consider the interaction between the laws and other social forces. When states have so much control over the multiple processes leading to the conferral of the label "felon," it is impossible to ignore these processes when evaluating a law that turns solely on that conferred status.[197]

The relationship between felon disfranchisement and race is not spurious. The goal of the Voting Rights Act of 1965 and its subsequent amendments was to eliminate racial discrimination in voting. It became clear that the Fourteenth and Fifteenth Amendments were insufficient when states implemented other voting requirements to prevent a racially-diverse electorate.[198] The shift to a results-based analysis with the 1982 amendment to the Act recognized that while many requirements to vote were facially race-neutral, they did not operate in race-neutral ways.[199] While amending the Act, the U.S. Senate stated that "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process."[200] Yet this statute,

196. Formal application refers to the disfranchisement of all persons convicted of a felony, without regard to race. Another complaint, however, arises in states that restore voting rights only through an application and pardon process, where voting rights may not be *restored* in a race-neutral manner. *See, e.g.*, Gary Kane & Scott Hiaasen, *Clemency Process Unfair to Blacks?* PALM BEACH POST, Dec. 23, 2001, at 1A (discussing racial disparities in Florida's process for restoring rights).

197. *See supra* notes 77–80 and accompanying text.

198. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308–15 (1966). *See supra* notes 10–14 and accompanying text.

199. *See supra* notes 10–14 and accompanying text.

200. S. REP. NO. 97-417, at 207 n.117 (1981), *reprinted in* 1982 U.S.C.C.A.N. 177, 207 n.117.

meant to enfranchise African Americans and eliminate practices with discriminatory impacts, has been used to support disfranchisement.[201] The growth of felon disfranchisement laws was another product of these eras, yet these laws have somehow escaped the same fate as poll taxes, literacy tests, and like measures, even though they bear the same taint as other invalidated voting qualifications.

The *Farrakhan* Court appears to be the first to call for a proper application of the totality of the circumstances standard under the Voting Rights Act as applied to felon disfranchisement laws.[202] In holding that courts must consider the interaction of felon disfranchisement laws and external factors, including social and historical conditions,[203] the Ninth Circuit gives challenges under the Voting Rights Act their due consideration; subsequent courts should analyze felon disfranchisement laws under the same framework to take the further step of invalidating the laws.

B. LEGISLATIVE REVIEW OF FELON DISFRANCHISEMENT

While legal challenges to felon disfranchisement have generally been unsuccessful, several state legislatures have changed their disfranchisement provisions in recent years. Legislative changes have extended the right to vote in some states, but the laws generally do not face any less resistance than in the courts. Debates over specific state laws generally focus on a desire for overall fairness and a concern about the racial impact of felon disfranchisement laws. Opponents of reform often attempt to shift these debates to one of being either "tough" or "soft" on crime, injecting a political element that is less apparent in judicial decisions.[204] As a result, most of the reforms in recent years were the culmination of years of work to overcome repeated rejections.[205] Some of these reforms, however, reflect an increasing acceptance of arguments that courts have rejected.

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201. *See* Fletcher, *supra* note 48, at 1900–01 (noting the "paradox" of using Section Two of the Fourteenth Amendment to support felon disfranchisement).

202. *See supra* notes 115–121 and accompanying text.

203. Farrakhan v. Washington, 338 F.3d 1009, 1011–12 (9th Cir. 2003), *reh'g denied by* 359 F.3d 1116 (9th Cir. 2004), *petition for cert. filed*, (U.S. May 24, 2004) (No. 13-1597).

204. *See infra* note 228; *see also* Mauer, *supra* note 73, at 42 (commenting on the "get tough" political culture).

205. *See generally* KALOGERAS, *supra* note 124.

Most of the recent changes have been in states that formerly disfranchised those who had completed their sentences.[206] While Delaware amended its law to restore voting rights automatically five years after completion of sentence, the bill had been in a senate committee for a decade because its chair "deeply opposed the legislation."[207] In 2003, Maryland eliminated a restriction that required recidivists to receive a pardon before regaining voting rights, although the new law currently requires a three-year waiting period and applies only to non-violent crimes.[208] This legislation was a priority for African American legislators and led to "an emotional debate that pitted tough-on-crime conservatives against African American senators who compared the current voting ban to the poll taxes and literacy tests that silenced the voices of black Americans for decades."[209]

Following the 1999 failure of a bill to enfranchise probationers in Connecticut, over forty organizations joined forces to form the Connecticut Voting Rights Restoration Coalition.[210] After another failure in 2000, the Coalition embarked on a "state-wide public awareness campaign," and the bill was ultimately successful in 2001.[211] Legislators viewed the bill as a "democracy issue, not a 'soft on crime' issue,"[212] and the governor approved the bill because he "just thought it was fair."[213]

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206. Since 1996, Delaware, Maryland, New Mexico, Nevada, Texas, and Wyoming successfully amended their laws that formerly disfranchised all ex-felons to some extent. *Id.* Legislation to do the same in Alabama, Florida, and Virginia failed. *Id.* at 1.

207. *Id.* at 2. Kalogeras also notes that the 2000 change had the support of seventy-five to eighty percent of Delaware citizens. *Id.* This level of support is consistent with other studies of public opinion on enfranchising felons. Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OP. Q. 275, 280–81 (2004).

208. KALOGERAS, *supra* note 124, at 3.

209. Lori Montgomery & Matthew Mosk, *Md. Bill Would Let Ex-criminals Vote*, WASH. POST, Mar. 30, 2002, at B5. The change in Maryland initially would have restored voting rights upon completion of sentence, but because of the strong opposition by Senate Republicans, the three-year waiting period resulted as a compromise. KALOGERAS, *supra* note 124, at 3.

210. KALOGERAS, *supra* note 124, at 2.

211. *Id.*

212. Miles S. Rapoport, *Restoring the Vote*, AM. PROSPECT, Aug. 13, 2001, *available at* http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=5841. The Department of Adult Probation in Connecticut also felt the new law would "help 're-root' individuals who are returning to their communities from prison." *Id.*

213. Paul Zielbauer, *Felons Gain Voting Rights in Connecticut*, N.Y. TIMES,

New Mexico repealed parts of its disfranchisement law as a result of a strong lobbying effort and the use of research showing the effect of felon disfranchisement on elections.[214] Although one Republican admitted fearing that these newly enfranchised people would register to vote as Democrats, he ultimately supported the bill, commenting, "Fair is fair. When people have served their time, all of it, it's very hard for me intellectually to say that person should not be restored to full citizenship."[215]

Legislatures across the country have thus responded to calls for reform of felon disfranchisement laws in different ways than courts. Rather than using a social contract theory to support disfranchisement, legislatures focus on reintegration into society and basic conceptions of fairness. Completing a sentence imposed for a criminal act appears to be a sufficient remedy to any previous breach of the social contract.[216] This argument continues to limit re-enfranchisement, however, because, with the exception of Connecticut, all of the recent changes have only affected the voting rights of those who have completed sentences, not the disfranchised population as a whole.

Similar to most courts, some legislators seem reluctant to acknowledge that laws phrased in race-neutral ways are not necessarily race-neutral.[217] Although the Maryland legislature seemed to accept arguments about racial impacts, recent debates in Alabama and South Carolina illustrate otherwise. Race was at the forefront of debates in these states when legislators unsuccessfully sought to restrict and expand, respectively, application of their states' felon disfranchisement law.[218]

May 15, 2001, at B5 (quoting the governor's press secretary).

214. KALOGERAS, *supra* note 124, at 5; *see supra* note 50 and accompanying text.

215. Donovan Kabalka, *Felons Might Be Able to Vote Again*, ALBUQUERQUE TRIB., June 29, 2001, at A2 (quoting New Mexico State Republican Party Chairman John Dendahl).

216. While some states have been receptive to this argument, Congress has not. Since 1999, two bills entitled The Civic Participation and Rehabilitation Act have failed. These measures would have restored the right to vote to all unincarcerated people with a felony conviction in federal elections. *See* H.R. 5510, 107th Cong. (2002); H.R. 906, 106th Cong. (1999). In January 2003, Representative John Conyers (D-Mich.), sponsor of the previous two bills, again reintroduced The Civic Participation and Rehabilitation Act of 2003. H.R. 259, 108th Cong. (2003). *See also* H.R. 1433, 108th Cong. (2003) (seeking to restore the right to vote to all who have completed their sentence in federal elections as part of The Ex-Offenders Voting Rights Act of 2003).

217. *See supra* note 82 and accompanying text.

218. *See* White, *supra* note 100 (discussing Alabama's experience with disfranchisement).

In response to the governor's veto of a re-enfranchisement law, one Alabama senator commented, "It's a slap in the face to us as African-American lawmakers."[219] In South Carolina, tension erupted from a proposal to implement a fifteen-year, post-sentence waiting period.[220] After one legislator brought an African American with a felony conviction before the legislature, the bill's sponsor passed out copies of an old newspaper article on the man's crime, on which he had written "Democratic poster boy for murderers' right to vote."[221] This prompted another legislator to call the act "Willie Horton race-baiting."[222] Thus, many legislators do not appear to be any more sensitive to arguments of disparate impact than are the courts.[223]

Despite the somewhat narrow reforms of felon disfranchisement laws in state legislatures, it is important to note that states have changed their laws. Regardless of their rationales for doing so, legislatures have taken important steps to accomplish what legal challenges have thus far failed to do.

III. MAKING THE RIGHT TO VOTE A TRUE FUNDAMENTAL RIGHT

A canvass of recent decisions by courts and legislatures poses the question of whether litigation or legislation is the best route to achieve change in felon disfranchisement laws. At first glance, legislation appears to be the more viable route to accomplish that goal because it has been the more successful of the two approaches.[224] Because voting is a fundamental right,

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219. *Id.*

220. Wise, *House Doesn't Kill Bill*, *supra* note 130; Wise, *Criminal Example*, *supra* note 130.

221. Wise, *House Doesn't Kill Bill*, *supra* note 130 (discussing the actions of State Representative John Graham Altman).

222. *Id.* (quoting Altman: "If it's blacks losing the right to vote, then they have to quit committing crimes.").

223. Although legislatures as a whole seem reluctant to view felon disfranchisement as a racial issue, it is most often African American legislators who propose to change felon disfranchisement laws within their respective states. Similarly, Representative John Conyers (D-Mich.) has repeatedly introduced bills to enfranchise unincarcerated felons for federal elections. *See supra* note 216.

224. For another assessment of the legislation-versus-litigation debate, see Symposium, *supra* note 74, at 282–84. Professor Saunders argues that litigation under the Voting Rights Act is the best route, commenting that "I do not think [the issue of felon disfranchisement] can very easily be addressed by legislation." *Id.*; *see also Developments in the Law: The Law of Prisons*, 115 HARV. L. REV. 1839, 1963 (2002) (commenting that "[s]tate legislatures offer a safe

however, states should be forced to eliminate felon disfranchisement laws, without the option of restoring them. Legislatures may provide the quicker solution, but individual state legislation does not solve the entire problem, nor does it recognize and remedy the severity of this national practice. Despite changes to laws in recent years and through the latter half of the twentieth century, over *five million* adults remain disfranchised. Legislative changes do not go far enough and are out of step with public opinion on the issue, both domestically[225] and internationally.[226] Voting is a fundamental right, and courts need to take that notion seriously by changing their approach to felon disfranchisement laws; approaching felon disfranchisement using a strict scrutiny standard of review—as is done with other restrictions on the right to vote—will ensure that voting is a true fundamental right.

Awaiting further piecemeal reforms through legislation contradicts the notion that voting is a fundamental right and creates difficulties that cannot cure the problem. One of the biggest problems with legislation is that states are still picking and choosing who to enfranchise, drawing categorical lines based on correctional status or type of conviction; these factors should not vary the right to vote.[227] Further, enfranchising those with convictions is not a cause that is politically "safe." It may be unpopular to advocate for the rights of those convicted of a felony,[228] but a fundamental right such as voting is not con-

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and, empirically speaking, effective route to reform" and that those seeking to litigate should find new strategies with which to challenge certain aspects of felon disfranchisement); Itzkowitz & Oldak, *supra* note 27, at 755 (concluding, in 1973, that "the legislative process provides a potentially more comprehensive and constructive course"); Martine J. Price, Note, *Addressing Ex-Felon Disenfranchisement: Legislation vs. Litigation*, 11 J.L. & POL'Y 369, 407 (2002) (concluding that "[e]fforts to attack disenfranchisement laws should be concentrated on the state and local legislatures"); Shapiro, *supra* note 81, at 564–65 (arguing that "vigorous litigation under the Voting Rights Act" is the best way for challengers of felon disfranchisement to proceed).

225. *See* Manza et al., *supra* note 207, at 280–82 (showing that eighty percent of survey participants supported re-enfranchising upon completion of sentence, and about sixty percent supported re-enfranchising all non-incarcerated persons).

226. *See generally* ROTTINGHAUS, *supra* note 58.

227. *See supra* notes 52–56 and accompanying text.

228. *See* KEYSSAR, *supra* note 2, at 308. Keyssar comments that "convicted felons—mostly minority males, many of them young—probably possess negative political leverage: it would be costly to any politician to embrace their cause." *Id.* Similarly, Professor Saunders has observed, "I cannot imagine that [a bill enfranchising felons] would pass, certainly not in an election year. It is

ferred only to certain classes of people, even if a given group is politically unpopular. Also, legislative change within a state is not safe from potential future change by a different state group of legislators.

Given low turnout rates, perhaps only a small percentage of the disfranchised population would vote. Actual participation, however, is irrelevant; the question is not one of choosing to vote, but rather one about having the right to make that choice. Thus, while state legislatures have taken some steps toward reform, they are not the appropriate forum, or at least should not supplant legal challenges. Most states have focused only on enfranchising those who have completed their sentences. While this is progress, the changes do not bring the laws in step with the notion that voting is a fundamental right for all, absent a measure narrowly-tailored to a compelling state interest. Eliminating felon disfranchisement laws through the judicial process will create uniformity and better serve the vision of a democratic government elected through the exercise of a fundamental right.

As the laws stand, they create confusion,[229] discrimina-

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a very difficult argument for anyone to make politically and I do not believe our legislators to be that brave." Symposium, *supra* note 74, at 284; Sasha Abramsky, *Barring Democracy*, MOTHER JONES, Oct. 17, 2000, *available at* http://www.motherjones.com/news_wire/felonvote.html (observing that felon disfranchisement "is an issue you would expect the Democrats to be hammering on . . . . [y]et because politicians of all political stripes are terrified of appearing 'soft on crime,' few . . . have taken up this cause"); *see also* Avery Johnson, *Weighing the Pros and Cons of Felon Voting*, WALL ST. J., Aug. 12, 2004, at A4. *See generally* KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997) (discussing the convergence of Republicans and Democrats taking "tough-on-crime" stances to maintain political support).

Legislative action has been less a product of committed politicians than the active persistence of particular lobbying groups, such as the NAACP, the ACLU, and the League of Women Voters, along with other church and labor groups. *See generally* KALOGERAS, *supra* note 124 (noting the various organizations advocating changes to state legislation on felon disfranchisement laws between 1996 and 2003).

229. *See supra* note 57. At a 2003 debate of potential Democrat 2004 presidential candidates, Senator Bob Graham (D-Fla.) (who later withdrew as a candidate) expressed satisfaction that his state, Florida, did not disfranchise felons beyond sentence. Nedra Pickler, *Democratic No-Shows Anger NAACP Leaders*, July 14, 2003, *available at* http://www.sfgate.com/cgibin/article.cgi?f=/news/archive/2003/07/14/national0209EDT0433.DTL. Graham's statement is particularly surprising, given that Florida is often targeted as having one of the most egregious practices of felon disfranchisement, Graham once served as Florida governor (which would place him at the head of the pardon process), and in 2002 Graham voted against enfranchising those who have

tion,[230] and unnecessary administrative problems.[231] There must be a legal, widespread, and binding change in precedent abolishing felon disfranchisement laws as they stand. Because individual state legislatures cannot accomplish that goal, courts should remain the primary forum for challenges to felon disfranchisement laws.

CONCLUSION

By failing to treat felon disfranchisement laws the same as other restrictions on the right to vote, courts have failed to give the right to vote its true status as a fundamental right. As a result, millions of people are disfranchised and effectively removed from the democratic process. If courts apply the same strict scrutiny standard to felon disfranchisement laws that they have applied to other restrictions on suffrage, it becomes clear that the laws are not narrowly tailored to a compelling state interest and are therefore unconstitutional. Although some state legislatures have amended their laws in recent years to become less restrictive, courts remain the proper venue for challenges to these laws. If the right to vote is fundamental, then felon disfranchisement is impermissible and only courts can fully eliminate this practice.

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completed their sentences for federal elections, following a debate in which Florida was cited as an example of a state disfranchising this group. 148 CONG. REC. S797, S801, S809 (daily ed. Feb. 14, 2002).

230. *See supra* notes 82–86 and accompanying text.

231. As of November 2002, Florida had a backlog of 81,000 cases of persons applying for restoration of voting rights and the chairman of the Florida Parole Commission commented, "I don't think we'll ever eliminate the backlog with the current resources we have." Wyatt Olson, *Barred for Life*, NEW TIMES BROWARD-PALM BEACH, Dec. 26, 2002. In Alabama, the restoration process can take up to two years, and understaffing problems exacerbate the issue. White, *supra* note 100.

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